

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-2388

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

RAYMOND E. KARLINSKY, HOWARD JACOBSON,
HARRY M. HATCHER and HORSEMEN'S BENEVOLENT
AND PROTECTIVE ASSOCIATION, INC., on behalf of
themselves and all others engaged in the business of owning,
training and racing thoroughbred horses in the United States,
who are similarly situated,

Plaintiffs-Appellants,

- against -

THE NEW YORK RACING ASSOCIATION, INC., JOCKEY
CLUB, JOHN C. CLARK, JACK J. DREYFUS, JR., JOHN
G. GALBREATH, FRANK M. BASIL, G.H. BOSTWICK,
JOHN W. HANES, FRANCIS KERMAN, ROBERT J.
KLEBERG, JR., JOHN A. MORRIS, PERRY R. PEASE,
OGDEN PHIPPS, JOHN M. SCHIFF, ALFRED G.
VANDERBILT, JOSEPH WALKER, JR., AND JOHN H.
WHITNEY,

Defendants-Appellees.

*On Appeal from a Judgment of the United States District Court,
Southern District of New York.*

APPELLANTS' APPENDIX

Volume I, pp. 1a - 300a

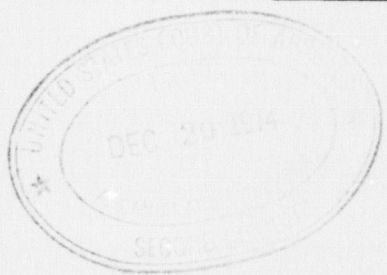
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DOCKET ENTRIES

CIVIL DOCKET

69 Civil 1082

69 Civil 1082

UNITED STATES DISTRICT COURT

Jury demand date:

a No. 106 Rev.

TITLE OF CASE

ATTORNEYS

AND E. KARLINSKY, HOWARD JACOBSON,
 M. HATCHER, and HORSEMEN'S BENEVOLENT
 AND PROTECTIVE ASSOCIATION, INC.,
 on behalf of themselves and all others
 engaged in the business of owning,
 training and racing thoroughbred horses
 in the United States, who are similarly
 situated,

Plaintiffs,

-against-

NEW YORK RACING ASSOCIATION, INC., JOCKEY
 ASSOCIATION, INC., (THOROUGHBRED OWNERS) & BREEDERS ASSOCIATION,
 INC., (RECORD PUBLISHING COMPANY, INC.),
 JAMES C. BRADY, GEORGE D. WIDENER, JOHN C.
 FLETCHER, JACK J. DREYFUS, JR., WALTER D. FLETCHER,
 FRANK M. BASIL, G. H. POST-
 RICHARD, CHRISTOPHER T. CHENERY, HARRY F. GUGGEN-
 HEIM, JOHN W. HANES, FRANCIS KERNAN, ROBERT J.
 BERG, JR., JOHN A. MORRIS, PERRY R. PEASE,
 JOHN PHIPPS, JOHN M. SCHIFF, GERARD S. SMITH,
 EDWARD G. VANDEREILT, JOSEPH WALKER, JR., and
 W. H. WHITNEY.

Defendants.

plaintiff:

JESSE MOSS

120 Madison Ave.

New York, N.Y.

defendant:

Townley, Updike, Carter & Rodgers
 (for Record Publishing Inc).

220 East 42nd St. NY 10017 MU 2-4567

Cahill, Gordon, Sonnett, Reindel & Ohl

(for debts other than Thoroughbred

Owners & Breeders Assn. and Record P.

80 Pine St. NY 10005 WJ 4-7400.

SATTERLEE & STEPHENS

277 Park Ave. NYC 10017

Deft. Thoroughbred Owners Etc)

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
mailed	Clerk				
mailed	Reopened 4/10/70				
of Action:	Docket fee				
Anti-trust laws	Witness fees				
arose at:	Depositions				

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PROCEEDINGS

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Date Order of Judgment Not

- 69 Filed complaint and issued summons.
- 9 Filed Notice of Deposition.
- 69 Filed stip and order that time for all defts other than Thoroughbred owners Breeders Assn and Record Publishing Co to answer to the complaint is extended to 11/3/69 Ryan J.
- 69 Filed stip and order that time for deft Record Pub Co to answer to the complaint is extended to 11/4/69 Etc Rayn G.
- 7/69 Filed stip and order that time for Deft Thoroughbred to answer to the complaint is extended to 11/17/69 Weinfeld J.
- 69 Filed stip and order that time for Record Publishing Co to answer to the complaint is extended to 11/18/69 Murphy J.
- 69 Filed stip and order that time for all defts other than Thoroughbred to answer to the complaint is extended to 11/17/69 Weinfeld J.
- 69 Filed stip and order that time for Deft Thoroughbred Owners & Breeders time to answer to the complaint is extended to 11/21/69 Murphy J.
- 69 Filed stip and order - that the time of Record Publishing Co to answer to the complaint is extended to 11/25/69 etc Croake J.
- 69 Filed stipulation and order extending deft. Thoroughbred Owners & Breeders Assn. Inc.'s time to answer complaint to 12/3/69. So ordered. Croake, J.
- 69 Filed stipulation and order adjourning depositions as indicated. So ordered. Croake, J.
- 69 Filed notice of motion of def t Record ret. 12/16/69 re dismiss complaint.
- 69 Filed defts memorandum of law in support of motion to dismiss.
- 2/69 Filed Stip and order that time for deft Thoroughbred to answer to the complaint is extended to 12/5/69 Frankel J.
- 69 Filed Deft Thoroughbreds notice of motion ret. 12/16/69 re dismiss complaint.
- 69 Filed defts memorandum of law in support of motion.....
- 6/69 Stip that motion of deft Record is adj;d to 12/16/69
- 70 Filed summons with marshal's return. Served Jockey Club by Frank Kalbac on 9-25-69 Served James C. Brady by C. Alzano on 12-8-69 Served Jack Dreyfus by Nine on 12-25-69 Served W. D. Fletcher by Miss Moriwitz on 12-24-69 Served John W. Galbreath by Miss Hunt on 12-25-69 Served G.H. Bostwick by UNABLE TO SERVE Christopher T. Chenery UNABLE TO SERVE Served Harry F. Eugenheim by Fountains on 12-30-69 Served Francis Kernan by Miss Campagna on 12-26-69 Served John A. Morris by Nine on 12-24-69 Served Perry R. Pease by Perry R. Pease on 1-23-69 Served John M. Schiff by Miss Sally Halmos on 12-24-69 Served G.S. Smith by Mrs. Florence McKeon on 10-21-69 Served Joseph Walker Jr. by UNABLE TO SERVE Served John H. Whitney by personally on 10-10-69 Thoroughbred Owners & Breeders Association Inc. by UNABLE TO SERVE Served John H. Whitney by personally 10-16-69 Served Thoroughbred owners & Breeders Association Inc. by Dorothy Cole on 10-8-69 Served N.Y. Racing Association by Frank Basil on 10-8-69 Served Frank M. Basil by personally on 10-8-69 Ogden Phipps by Enlings on 10-17-69 Served Alrod G. Vandervilt by max personally on 1-20-69 Served George D. Widener by John Albrecht on 10-10-69 Served John C. Clark by personally on 10-27-69 Served Robert J. Kleberg by Robert J. Kleberg on 11-4-69 (District of Texas) Served Record Publishing Co. by William H.P. Robertson on 9-25-69 Served Joseph Walker Jr. by UNABLE TO SERVE Served John W. Hanes by Mr. Fred L. Greenally on 10-14-69 Served G.H. Bartwick by Mr. Hirubeck on 1-29-69 Served J.W. Calbreath by on 10-24-69
- 69 Filed Reply Memorandum of Law in support of motion by deft. Record Pub.
- 70 Filed Supplemental Memorandum in opposition to motion to dismiss.

continued next page 3

DATE	JUDGE KNOX	PROCEEDINGS	JUDGE MO LER
Dec. 30-69	Filed Reply Memorandum.		
Mar. 20-70	Filed OPINION #36632. Defendants' motions to dismiss plaintiffs' complaint are granted with leave to amend within 20 days for the purpose of stating a proper claim, etc. So ordered. MacMahon, J. (mailed notice)		
Mar. 20, 70	Filed MEMO. END. on motion papers filed 11-18-69 Motion granted. See opinion filed this date with deft Record Publishing Co. Inc's motion to dismiss the complaint. So Ordered. MacMahon J.		
Mar. 20, 70	Filed MEMO. END. on motion papers filed 12-5-69 Motion granted. See opinion filed this date with deft Record Publishing Co. Inc's motion to dismiss complaint. So Ordered MacMahon, J.		
Apr. 10-70	Filed Amended Complaint.		
Apr. 10 70	Filed stip and order that deft's time to answer the complaint be extended to 4-30-70 So Ordered. MacMahon J.		
May 1-70	Filed stipulation and order extending all defts. other than Thoroughbred Owners & Breeders Assn. and Record Pub. Co. Inc. to move, answer, etc. the amended complaint to 5/7/70. So ordered. Tenney, J.		
May 1-70	Filed stipulation and order extending Record Publishing Co. Inc.'s time to answer amended complaint to 5/7/70, etc. So ordered. Tenney, J.		
May 1-70	Filed stipulation and order extending deft. Thoroughbred Owners & Breeders Assn.'s time to answer amended complaint to 5/7/70. So ordered. Tenney, J.		
May 8-70	Filed Notice of Motion re: Dismiss Amended Complaint. Ret. 5/19/70. SW&F		
May 8-70	Filed Memorandum in support of motion by deft. Thoroughbred to dismiss amended complaint.		
May 8-70	Filed Notice of Motion re: Dismiss Amended Complaint. Ret. 5/19/70. (TUC&R)		
May 8-70	Filed Memorandum of Law in support of motion by deft. Record Publishing to dismiss.		
May 8-70	Filed Notice of Motion re: Dismiss complaint. Ret. 5/19/70. (COW&O)		
May 8-70	Filed Memorandum in support of motion to dismiss amended complaint.		
May 18-70	Filed stipulation adjourning motion now ret. 5/19/70 to 6/9/70.		
June 8-70	Filed stipulation adjourning motion now ret. 6/9/70 to 6/16/70.		
June 15-70	Filed Affidavit of Jesse Moss in opposition to motion to dismiss amended complaint.		
June 15-70	Filed Memorandum in opposition to motion to dismiss amended complaint.		
Feb. 26-71	Filed deft. Thoroughbred Owners & Breeders Association, Inc. has been changed to; Satterlee & Stephens		
Mar. 4-71	Filed Opinion # 37,444--For the reasons stated above the motions of the New York Racing Association, Inc., the Jockey Club and the individual defts' to dismiss the complaint are denied; the motions of Record Publishing Company, Inc. and Thoroughbred Owners & Breeders Association, Inc. to dismiss the complaint as to them are granted. So Ordered: Lasker, J. M/N		
Mar. 4-71	Filed Reply affdvt. of William H. P. Robertson, for deft. Record Publishing Co. to Jesse Moss, affdvt. for plffs'.		
Jun. 17-70	Filed in Court Reply Memorandum in support of Certain Defts' to dismiss the Amended Complaint. (Entered 3-5-71)		
Jun. 17-70	Filed in Court plffs' Surreply Memorandum. (Entered 3-5-71)		
Mar. 9-71	Filed defts' The New York Racing Assoc., Inc. et al notice to take deposition of plffs' Jacobson, on 3-22-71, Manfuso on 3-29-71, Mooney, on 4-5-71, Karlinsky, on 4-7-71 and Hatcher on 4-12-71.		
Mar. 24-71	Filed order and final judgment that amended complaint is dismissed as to defts' Thoroughbred Owners and Record Publishing Co., Inc. Final judgment is entered dismissing amended complaint as to said defts'. Clerk is directed to make entry of this final judgment. Lasker, J. Judgment entered Clerk M/N ent. 3-25-71		

DATE

PROCEEDINGS

- 24-71 Filed Memo Endorsed on Final Judgment filed this date--The application of defts' Thoroughbred Owners and Record Publishing Co., Inc. for a final judgment dismissing the amended complaint is granted. The judgment submitted by defts' Thoroughbred Owners and Record Publishing Company, Inc. is being entered concurrently with the filing of this endorsement. Lasker, J. 4/N
- 24-71 Filed pliffs' Supplemental affdvt. in opposition to settlement of order and entry of judgment to certification pursuant to Rule 54(b) FRCP
- 24-71 Filed pliffs' affdvt. in opposition to defts' Thoroughbred Owner and Record Publishing Co., Inc., settlement of order and entry of judgment to certification pursuant to Rule 54(b) F.R.C.P.
- 24-71 Filed defts' Thoroughbred Owners & Breeders Assoc., Inc. Affdvt. in support of judgment pursuant to Rule 54(b) FRCP.
- 24-71 Filed deft. Record Publishing Co., Inc., Affdvt. in support of judgment pursuant to Rule 54(b) FRCP.
- 29-71 Filed stip and order that the time for defts' to answer amended complaint is ext. from 3-15-71 to 4-20-71. Cannella, J.
- 9-71 Filed copy of Order and Final Judgment dated 3-25-71 with Notice of Entry of Judgment. Ret. 4-22-71.
- 1-71 Filed defts' ANSWER to the amended complaint
- 7-71 Filed true copy of order that the following defts' have their deposition taken on the following dates as indicated. C
- John W. Hanes, May 13, 1971--Frank M. Basil, May 14, 1971
- James C. Brady, May 17, 1971--Ogden Phipps, May 18, 1971
- Motley, J. M/N
- 2-71 Filed defts' interrogs. to pliffs'
- 15-71 Filed stip and order that time for pliffs to answer the interrogs. is extended to 7-30-71 Gurfein J.
- 7-71 Filed stip & order that time for pliffs' to answer or object to first set of interrogs. is ext. to 9-17-71 & pliffs' request for production of documents is withdrawn. So ordered--Lasker, J.
- 7-71 Filed stip and order that time for pliffs to answer the interrogs., to extended to 10-8-71 McLean J.
- 11-71 Filed stip and order that the time for the pliffs' to answer the first set of interrogs. addressed to them is extended to 11-5-71 Cooper J.
- 11-71 Filed stip and order that time for the pliffs to answer the interrogs. is extended to a date to be agreed upon by the parties or upon 30 days notice of the attys' Briant J.
- 12-71 Filed Transcript of the record of proceedings dated Jun 29 1972.
- 3-72 Filed Suggestion of death upon record for deft George D. Widner.
- 5-72 Filed defts Notice to take deposition of Pliffs Karlinsky, Jacobson, and Hachter on 3/13/73 and 3/20/73 and 3/27/73.
- 12-73 Filed deft's affidavit & notice of motion Re: inspection ret. 12-7-73.
- 12-73 Filed deft's memorandum in support of motion ret. 12-7-73.
- 1-73 Filed Memo-Endorsed on deft's motion filed 11-30-73 Re: inspection; Motion referred to Magistrate Jacobs to hear & report. Knapp, J.
- 1-73 PRE-TRIAL CONFERENCE HELD.
- 1-74 Filed Memo-Endorsed on cross-motion by pliff's Re: produce. Motion denied without prejudice to renewal at trial on the recommendation of the Magistrate. Knapp, J. m/n
- 1-74 Filed deft's motion (cross motion) & affidavit Re: inspect & produce.
- 1-74 Filed report of Magistrate Jacobs.

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DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
11-74	Filed Memo-endorsed on deft's motion filed 11-30-73 Re: documents: Motion denied without prejudice to renewal at trial on recommendation of the Magistrate. Knapp, J. m/n	
6-74	Filed plttf's affidavits & notice of motion Re: Class action ret. 3-8-74.	
6-74	Filed Plttf's memorandum in support of motion for class action, ret. 3-8-74.	
2-74	Filed Memorandum & order that plttf. has moved that this action be made a class suit, The deft's principal opposition to motion is based on the claim of undue delay. This, court finds that plttf. has failed to meet the "as soon as practicable" test & his motion is denied. So ordered. Knapp, J. m/n	
26-74	Filed deft's notice of motion to dismiss amended complaint, ret. 7-8-74, as to plttf Horsemen's Benevolent Assoc.	
26-74	Filed deft's affidavit & notice of motion dismissing complaint, as to plttf. Harry H. Hatcher ret. 7-8-74.	
26-74	Filed affidavit of R.S. Fine in support of motions to dismiss, complaint ret. 7-8-74.	
26-74	Filed deft's (HBP) memorandum in support of motion to dismiss.	
26-74	Filed deft's suggestion of death upon the record of following deft's, James C. Brady--Christopher C. Chenery-- Walter D. Fletcher--Harry A. Guggenheim & Gerard S. Smith.	
8-74	Non-Jury trial begun before EKNAPP, J.	
9-74	Trial continued.	
10-74	" "	
15-74	" " & concluded. Decision reserved.	
17-74	Filed Plttf's memorandum in opposition to deft's motion to, dismiss amended complaint.	
6/7/85	Retranscribed from 7/15/74	
9-74	Filed transcript from 7/8-9-10-15/74	
16-74	Filed Order & Judgment that judgment be entered with costs, in favor of the deft's against the plttf. Plttf's amended, complaint is dismissed. Knapp, J. Judg. Ent. Clerk. m/n Ent. 9-18-74.	
3-74	Filed bill of costs as taxed in favor of (all) deft's in the amount of \$617.02 & docketed as judgment 74,783.	

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DATE

FILINGS—PROCEEDINGS

15-74 Filed plttf's notice of appeal to the USCA from final judgment ent.
on 9-18-74. Mailed copy to Cahill, Gordon & Reindel.

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AMENDED COMPLAINT (Filed April 10, 1970)
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

RAYMOND E. KARLINSKY, HOWARD JACOBSON,
HARRY M. HATCHER, and HORSEMEN'S BENEVOLENT
AND PROTECTIVE ASSOCIATION, INC.,
on behalf of themselves and all others
engaged in the business of owning, training
and racing thoroughbred horses who are
similarly situated,

Plaintiffs,

-against-

THE NEW YORK RACING ASSOCIATION, INC.,
JOCKEY CLUB, THOROUGHBRED OWNERS & BREEDERS
ASSOCIATION, INC., RECORD PUBLISHING COMPANY,
INC., JAMES C. BRADY, GEORGE D. WIDENER, JOHN
C. CLARK, JACK J. DREYFUS, JR., WALTER D.
FLETCHER, JOHN G. GALBREATH, FRANK M. BASIL,
G. H. BOSTWICK, CHRISTOPHER T. CHENERY,
HARRY F. GUGGENHEIM, JOHN W. HANES, FRANCIS
KERNAN, ROBERT J. KLEBERG, JR., JOHN A.
MORRIS, PERRY R. PEASE, OGDEN PHIPPS, JOHN
M. SCHIFF, GERARD S. SMITH, ALFRED G.
VANDERBILT, JOSEPH WALKER, JR., and JOHN
H. WHITNEY,

Defendants.

The plaintiffs above named, on behalf of themselves
and all others engaged in the business of owning, training
and racing thoroughbred horses in the State of New York
and elsewhere in the United States, who are similarly

situated, by Jesse Moss their attorney, complaining of the defendants, allege as follows:

FIRST: This complaint is filed and the jurisdiction of this Court is involved, under the provisions of 15 U.S.C. Sections 15 and 26 by reason of violations of the anti-trust laws of the United States; to-wit 15 U.S.C. Sections 1 and 2, pursuant to which, the injunctive relief and the damages requested herein are prayed for. All of the corporate defendants and most of the individual defendants maintain offices and/or transact business in this District, and are subject to suit therein.

SECOND: Pari-mutuel thoroughbred racing is authorized and engaged in, in approximately thirty states, including the State of New York. Racing dates do not coincide in the various states and racing stables and owners do not customarily confine their activities to one locality, but from time to time race their horses in the various states, depending upon the racing dates available, the availability of stall space and the conditions, which in the opinion of the owners, are most favorable to their horses and their chances of winning. Earnings of a race horse depend upon its success in competition with others; if a horse places first, second, third, or fourth in a

race, it wins part of the purse money; if it does not, it receives nothing. The amount of money distributed as purses by a racetrack is not divided among or paid to, all horses competing at that track, but goes to those successful in winning or placing in races and excludes those who do not win or place.

THIRD: The breeding industry is an integral part of thoroughbred racing and is conducted in rural areas in many states. Horses are moved from state to state for this purpose with mares normally being transported to the various stud farms for breeding after which they are returned to the states in which their owners are located. Sales of horses are held periodically in various states and horses are shipped and transported to those states for such purpose and shipped out again at the conclusion of such sales. Horses are frequently shipped to the southern states for wintering and winter training and brought back again in order to race in the various states. Accompanying all of the foregoing is an interstate movement of trainers, owners and grooms who are normally licensed to race by several states.

FOURTH: Upon information and belief, that at the times

herein mentioned the defendant, New York Racing Association, Inc., (hereinafter referred to as NYRA), has been and is a corporation organized and existing under and by virtue of the laws of the State of New York and owns and operated certain racetracks; to-wit, Aqueduct, Belmont and Saratoga, at which substantially all of the racing in that State is conducted and its affairs are managed by a board of twenty directors known as trustees.

FIFTH: Upon information and belief, that at the times herein mentioned the defendant Jockey Club, Inc., (hereinafter referred to as Jockey Club) has been and is a corporation organized and existing under and by virtue of the laws of the State of New York, which has seventy-five members and a Board of Directors known as Stewards. It purports to act in a supervisory and administrative capacity in matters dealing with racing, including but not limited to, record keeping, transfers, sales and leases of horses and adoption and use of stable names, and it asserts the right to pass judgment upon, approve or disapprove such transactions and collect fees in connection therewith that such acts and rulings are accepted by the racetracks in New York among others; that it promulgates rules of racing recognized by racetracks, subject to rules of Racing Commissions in States which have them, and it consults with and advises Racing Commissions with respect to any rule changes; that it

appoints and/or influences the appointment of stewards, other racing officials and management staff who conduct and control race meetings in New York and certain other states; it publishes and controls the American Stud Book, the authority on blood lines and pedigrees of all registered and thoroughbred horses, which is indispensable to the breeding and racing of thoroughbred horses in the United States; and in addition, it owns and operates a breeding farm known as Lookover Stallion Station.

SIXTH: Upon information and belief that at the times herein mentioned, the defendant Jockey Club and/or its nominees owned and controlled the entire issued stock of the defendant NYRA and that all trustees of NYRA are selected from the membership of the Jockey Club.

SEVENTH: Upon information and belief, that at the times herein mentioned, the defendant Jockey Club owned and/or controlled the defendant Record Publishing Company, Inc., publisher of a weekly magazine called The Thoroughbred Record, hereinafter more fully described.

EIGHTH: Upon information and belief, that the defendant, Thoroughbred Owners and Breeders Association, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York and has offices in New York,

Kentucky and Florida; that the said Association publishes and distributes throughout the United States, a weekly magazine The Blood Horse, which disseminates information concerning racing generally and the breeding and performance of race horses in particular; that it has substantial influence upon the conduct of racing through its published comments, opinions and advice in its editorials and articles; that those articles and the comments and opinions expressed therein, affect the value of horses, their desirability to racetracks and their racing opportunities.

NINTH: Upon information and belief that at the times, herein mentioned, the defendant Record Publishing Company, Inc., has been a corporation existing under and by virtue of the laws of the State of Kentucky, where it has its principal offices and has been a subsidiary of and owned and controlled by the defendant, Jockey Club; that it is the publisher of a weekly magazine called The Thoroughbred Record, distributed throughout the United States, which is devoted to news and comments concerning racing and persons interested in it; that it has substantial influence upon the conduct of racing; and that its articles, editorials and comments substantially affect the value of horses, their desirability to racetracks and their racing opportunities.

racing opportunities.

TENTH: That the aforesaid two publications are the only nation-wide publications of this nature, and there are no others of similar scope, circulation and influence upon the sport of racing in the United States.

ELEVENTH: That the defendants NYRA and Jockey Club each appoint one of the three stewards charged with the conduct and supervision of racing at Aqueduct, Belmont and Saratoga and that NYRA appoints other officials, officiating at those racetracks and at race meetings, including paddock judges, and placing judges who decide the order of finish of racing.

TWELFTH: That the defendant NYRA employs and controls a racing secretary who decides which horses and owners may participate in a race meeting and the extent thereof, what stall space shall be made available to them and how long they may stay, decides the nature, conditions and makeup of the races to be programmed, including the eligibility of horses for inclusion in or exclusion from given races, and the purses to be raced for; a handicapper, who decides (according to his opinion of the relative abilities of horses) what weight each one shall carry in a handicap race; a starter; who is responsible for the start

of the starting gate and starting procedures (including in certain instances the positioning of horses and the power of recall); and a clerk of the scales, who decides whether the weight requirements have been adequately met.

THIRTEENTH: That the above described persons, in the exercise of their functions, rule and control every facet of a race meeting and their acts, desires and decisions affect the availability of racing opportunities in New York for plaintiffs and all other horsemen, the conditions under which they race, the extent to which they are permitted to compete, the relative ability of the horses against which they must compete in order to win money, and thus, the chances of every horse and the earnings of every horse owner, trainer and jockey.

FOURTEENTH: That the Thoroughbred Racing Association, (hereinafter referred to as TRA) not named herein as a defendant but as a co-conspirator, is a trade association, whose members consist of racetracks throughout the United States and whose purposes, among others, are to encourage and provide for, consultation and cooperation among tracks with respect to matters affecting them in all areas of racing; its principal office is located in the City and State of New York.

FIFTEENTH: That at the times mentioned herein, the plaintiffs Raymond E. Karlinsky, Howard Jacobson and Harry M.

Hatcher, have been and are owners and trainers of thoroughbred horses which race in various parts of the United States, who are licensed in various states to engage in such activity and race their horses in numerous states in the eastern part of the United States, including the State of New York. Plaintiffs Karlinsky and Jacobson are citizens of the United States and residents of the State of New York; plaintiff Hatcher is a citizen of the United States and a resident of the State of Virginia.

SIXTEENTH: That the plaintiff Horsemen's Benevolent and Protective Association, Inc., (hereinafter referred to as HBPA) is a non-profit membership corporation duly organized and existing under the laws of the State of Rhode Island; that it has as its members, over 90% of the owners and trainers of thoroughbred horses engaged in the sport of thoroughbred racing and that the purposes of said corporation are, among other things, to further the best interests and the prosperity of the sport of racing and of the participants therein, and that it functions in the State of New York through one of its duly constituted divisions; to-wit, the New York Division.

SEVENTEENTH: That the defendant, James C. Brady, is

Chairman of the Board of Trustees of the defendant NYRA, a member and steward of the defendant Jockey Club, a director of TRA, a member of the Board of Directors of the defendant, Record Publishing Company, Inc., publishers of The Thoroughbred Record, has an ownership interest in a thoroughbred breeding farm, and owns and races thoroughbred horses in New York and other States in competition with plaintiffs and other horsemen.

EIGHTEENTH: That the defendant George D. Widener is Honorary Chairman of the Board of Trustees of the NYRA, a member and steward of the defendant Jockey Club, Honorary Chairman of the Board of Directors of the defendant Record Publishing Company, Inc., publishers of The Thoroughbred Record, has an ownership interest in a thoroughbred breeding farm, and owns and races thoroughbred horses in New York and other states in competition with plaintiffs and other horsemen.

NINETEENTH: That the defendant Frank M. Basil, at times herein mentioned has been President of the NYRA, and a director of the TRA.

TWENTIETH: That the defendant G. H. Bostwick is a Trustee of the NYRA, a member of the Jockey Club, a member of the Board of Trustees of defendant Thoroughbred Owners and

Breeders Association, publishers of The Blood Horse, has an ownership interest in a thoroughbred breeding farm and owns and races thoroughbred horses in New York and other states, in competition with plaintiffs and other horsemen.

TWENTY-FIRST: That the defendant, Christopher Chenery, is a Trustee of the NYRA, a member of the defendant Jockey Club, a member of the Board of Trustees of the defendant Thoroughbred Owners and Breeders Association, publisher of The Blood Horse, has an ownership interest in a thoroughbred breeding farm, and owns and races thoroughbred horses in New York and elsewhere in competition with the plaintiffs and other horsemen.

TWENTY-SECOND: That the defendant, John C. Clark, is a Trustee of the defendant NYRA, a member of the defendant Jockey Club, a Director of the TRA and owns and races thoroughbred horses in New York and elsewhere in competition with the plaintiffs and other horsemen.

TWENTY-THIRD: That the defendant, Jack Dreyfus, Jr. is a president and a Trustee of the defendant NYRA, a member of the defendant Jockey Club, a member of the Board of Trustees of the defendant Thoroughbred Owners and Breeders Association,

publishers of The Blood Horse, has an ownership interest in a thoroughbred breeding farm, owns and races thoroughbred horses in New York and elsewhere in competition with the plaintiffs and other horsemen.

TWENTY-FOURTH: That the defendant, Walter D. Fletcher, is a Trustee of the defendant NYRA, a member of the defendant Jockey Club, has an ownership interest in a thoroughbred breeding farm, and owns and races thoroughbred horses in New York and elsewhere, in competition with the plaintiffs and other horsemen.

TWENTY-FIFTH: That the defendant, John W. Galbreath, is a Trustee of the defendant NYRA, a member of the defendant Jockey Club, a member of the Board of Directors of the defendant Record Publishing Company, Inc. publishers of The Thoroughbred Record, has an ownership interest in a thoroughbred breeding farm and owns and races thoroughbred horses in New York and elsewhere, in competition with the plaintiffs and other horsemen.

TWENTY-SIXTH: That the defendant, Harry F. Guggenheim, is a Trustee of the defendant NYRA, a member of the defendant Jockey Club, a member of the Board of Directors of the defendant Record Publishing Company, Inc., publishers of The Thoroughbred Record, has an ownership interest in a thoroughbred breeding farm and owns and races thoroughbred horses in New York and

elsewhere, in competition with the plaintiffs and other horsemen.

TWENTY-SEVENTH: That the defendant John W. Hanes is a Trustee of defendant NYRA, a member and steward of the defendant Jockey Club, a member of the Board of Directors of the defendant Record Publishing Company, Inc., publishers of The Thoroughbred Record, has an ownership interest in a thoroughbred breeding farm and owns and races thoroughbred horses in New York and other States in competition with plaintiffs and other horse owners.

TWENTY-EIGHTH: That the defendant Francis Kernan is a Trustee of the defendant NYRA, a member of the defendant Jockey Club, and owns and races thoroughbred horses in New York and elsewhere in competition with the plaintiffs and other horsemen.

TWENTY-NINTH: That the defendant Robert J. Kleberg, Jr. is a Trustee of the defendant NYRA, a member of the Jockey Club, and owns and races thoroughbred horses in New York and elsewhere in competition with the plaintiffs and other horsemen.

THIRTIETH: That the defendant John A. Morris is a Trustee of the NYRA, a member of the Jockey Club, has an ownership interest in a thoroughbred breeding farm, and owns and races

thoroughbred horses in New York and other States in competition with the plaintiffs above named and other horsemen.

THIRTY-FIRST: That the defendant Perry R. Pease is a Trustee of the defendant NYRA, a member of the defendant Jockey Club, and owns and races thoroughbred horses in New York and other States in competition with the plaintiffs and other horsemen.

THIRTY-SECOND: That the defendant Ogden Phipps is a Trustee of defendant NYRA, a member and steward of the defendant Jockey Club, a member of the Board of Directors of the defendant Record Publishing Company, Inc., publishers of The Thoroughbred Record, has an ownership interest in a thoroughbred breeding farm and owns and races thoroughbred horses in New York and other States in competition with the plaintiffs above named and other horsemen.

THIRTY-THIRD: That the defendant John M. Schiff is a Trustee of the defendant NYRA, a member of the defendant Jockey Club, and owns and races thoroughbred horses in New York and other States, in competition with the plaintiffs and other horsemen.

THIRTY-FOURTH: That the defendant, Gerard S. Smith, is a Trustee of NYRA, a member and steward of the Jockey Club

and owns and races thoroughbred horses in New York and other States, in competition with the plaintiffs above named and other horsemen.

THIRTY-FIFTH: That the defendant Alfred G. Vanderbilt is a Trustee of the defendant NYRA, a member of the defendant Jockey Club, a Trustee and member of the executive committee of the defendant, Thoroughbred Owners and Breeders Association, publisher of The Blood Horse, a member of the Publication Committee of The Blood Horse, has an ownership interest in a thoroughbred breeding farm and owns and races thoroughbred horses in New York and other States, in competition with the plaintiffs above named and other horsemen.

THIRTY-SIXTH: That the defendant Joseph Walker, Jr. is a Trustee of the defendant NYRA, a member of the defendant Jockey Club, and owns and races thoroughbred horses in New York and other States in competition with the plaintiffs and other horsemen.

THIRTY-SEVENTH: That the defendant, John H. Whitney is a Trustee of NYRA, a member and steward of the defendant Jockey Club, has an ownership interest in a thoroughbred breeding farm and owns and races thoroughbred horses in New York and other States, in competition with the plaintiffs and other horsemen.

THIRTY-EIGHTH: That all twenty of the Trustees of the

NYRA are members of the Jockey Club and six of the nine stewards of the Jockey Club are also NYRA Trustees; that twelve of the said Trustees own thoroughbred breeding farms; that four of the said Trustees are officers or directors of TRA; that seven Trustees are officers or directors of the defendant Record Publishing Company, Inc., publisher of The Thoroughbred Record; that three Trustees are officers or directors of the defendant Thoroughbred Owners and Breeders Association, publisher of The Blood Horse; all of them own and race thoroughbred horses in New York and other States in competition with plaintiffs and other horsemen.

THIRTY-NINTH: That of the nine stewards of the defendant Jockey Club, six are trustees of the defendant NYRA, six are trustees or directors of the defendant Record Publishing Company, Inc., publisher of The Thoroughbred Record, one is a trustee of Thoroughbred Owners and Breeders Association, publisher of The Blood Horse, three are officers or directors of TRA, and seven have ownership interests in thoroughbred breeding farms. That all of them own and race thoroughbred horses in New York and other States, in competition with plaintiffs and other horsemen.

FORTIETH: That members and stewards of the defendant Jockey Club comprise the entire board of trustees of the

defendant NYRA; eleven are trustees or directors of the defendant Record Publishing Company, Inc., publishers of The Thoroughbred Record; twelve are trustees of Thoroughbred Owners and Breeders Association, publisher of The Blood Horse, six are trustees or directors of TRA; thirty-five have an ownership interest in thoroughbred breeding farms; that all or most own and race thoroughbred horses in New York and other States in competition with plaintiffs and other horsemen.

FORTY-FIRST: That six of the twenty-three Directors of the TRA are members of the Jockey Club and TRA Directors are two of the nine stewards of the Jockey Club; that three of the said Directors own thoroughbred breeding farms; that four of said Directors are trustees of the NYRA; that three Directors are officers or directors of the defendant Record Publishing Company, Inc., publisher of The Thoroughbred Record; that one Director is a member of the Board of Trustees of the Thoroughbred Owners and Breeders Association, publisher of The Blood Horse.

FORTY-SECOND: That in addition to the foregoing, there is a substantial coincidence of membership on the Boards of Directors, Trustees and Officers of defendant, Record Publishing Company, Inc., publisher of The Thoroughbred Record, and

defendant Thoroughbred Owners and Breeders Association, publisher of The Blood Horse, and persons holding ownership interests in thoroughbred breeding farms.

FORTY-THIRD: That the breeders and breeding farms referred to herein, include those located in the eastern part of the United States which are, and are generally recognized as being, the leaders of the industry, in that they have the best facilities, the most desirable studs, and the best records of success in the racing records of horses sired at their farms; that they have substantial influence and/or control of access to the best, and most sought after studs and blood lines and that horses bred by them are known to patrons of racing, sought after by the racetracks and are offered the best racing opportunities by most tracks including those in the State of New York.

FORTY-FOURTH: That the relationships, powers and control herein described have given the defendants above named, substantial excessive, unfair and unreasonable influence and control of racing and racing activities in New York, as well as elsewhere in the eastern portion of the United States; that for a period of over 10 years up to and including the present,

defendants have entered into and engaged in a conspiracy, understanding and method of operation which tends to and does, monopolize and restrain trade in violation of the anti-trust laws of the United States; i.e., to seize and extend such power and control and use it to give the individual defendants who are engaged in the business of racing horses at tracks owned and controlled by them, unfair competitive advantage and profits, to promote and favor their own racing opportunities, racing conditions, chances of winning and earnings, to the corresponding detriment, disadvantage and loss of all other horsemen competing against them (including the individual plaintiffs above named) who as a result thereof, are able to earn a smaller portion of the purses offered than they normally would, if equal competitive opportunities prevailed. The objectives of the conspiracy, among other ways, have been pursued as follows:

A. FAVORITISM IN STALL ALLOCATIONS. Recognizing that in order for a horse owner to participate in a race meeting, it is necessary for him to be allocated stall space, preferably for as large a portion of his racing stable as possible, defendants have unfairly favored themselves in their activities as horsemen at the expense of other horse owners in such allocation and have exempted and excepted themselves from the procedures

governing the allocation and use of stalls which are enforced against plaintiffs and other horsemen.

Defendants have required that horse owners wishing to race at the tracks which they operate, agree to come in at the beginning of the race meeting and continue to race for its duration, but with respect to their own racing stables, they do not impose this requirement, but reserve stalls for them and permit them to come in substantially later at the peak of the season when the attendance, weather and other racing conditions are more favorable, and to leave earlier.

Horsemen having stall space are required to enter and race their horses at the track with reasonable frequency or be denied stalls, but defendants' stables are permitted to occupy stall space without complying with this requirement imposed upon others and frequently use the stalls and barns made available to them, even during a racing meeting, merely for their own convenience and for stabling and training purposes.

During race meetings at times when horses are needed on the grounds to fill races necessary for good racing programs not only stalls but entire barns have been kept vacant, reserved for the racing stables of defendants until they are ready to come in and use them, contrary to the rules and treatment accorded to all other horsemen, who are subject to the track's averred policy of not reserving stall space for future use, and this occurs at times during which there are horsemen

available seeking an opportunity to race at these tracks.

Upon occasion, when too many stalls are being kept vacant for this purpose; namely, the convenience of the persons above described, other horsemen are allotted stalls only on a temporary basis and are required to vacate those stalls when the stables owned or controlled by the individual defendants are ready to move in.

The allocation or withholding of stall space is used as an instrument of discipline and punishment; the defendants make other horsemen aware that criticism of them or their methods of conducting racing may result in a refusal to allot stalls or a loss of those allotted.

B. PURSE DISTRIBUTION. The annual purse schedules are so arranged that much larger purse percentages are paid during those portions of the season in which most of the stables owned or controlled by defendants are racing, than are paid at other times.

C. PROGRAMMING AND CONDITIONING OF RACES. The conditions and nature of the racing programs offered, including the quality of the horses against which they must compete, are tailored to suit the horses which defendants own and increase their chances of winning. In races in which defendants compete, there is a disproportionate number of short fields which improves the winning chances of their horses. The individual

defendants own or control a large proportion of the horses eligible for special features, invitationals and stake races for which the most substantial purses are paid and they have benefitted themselves at the expense of other horsemen by allocating to such races an excessive proportion of all purse monies paid out, by normal track standards.

D. THE SARATOGA MEETING. At the annual race meeting at Saratoga held for a period of 24 days, at which most of the individual defendants compete and which they have traditionally combined with an active social season, defendants use income generated at Aqueduct and Belmont by the large number of horsemen competing there, to support and pay the expenses of the lesser Saratoga meeting, which has a much smaller attendance and much smaller group of horsemen participating (although a substantially larger proportion of the defendants' stables) and to pay abnormal and unduly large purses, amounting to as much as 93% of the actual receipts at Saratoga, to the horsemen racing there, well over twice as much as the purse percentages offered and paid at Aqueduct and Belmont and well over the percentages considered fair, sound and normal in the racing industry.

E. BREEDING. The control of breeding in the eastern states and access to the best and most valuable blood lines, referred to in Paragraph FORTY-THIRD herein, has been used by defendants to restrict and deny to horse owners other than

themselves, fair and equal access to breeding facilities by refusing to recognize priority of date of application or any other fair and accepted standard, to have favored each other, and members of the Jockey Club, to the substantial exclusion of others, who have thereby been prevented from improving the horses which they will race against those owned by defendants.

F. PUBLICATIONS. The defendants have used The Blood Horse and The Thoroughbred Record referred to in Paragraphs EIGHTH, NINTH and TENTH of this complaint, in furtherance of the conspiracy, as apologists and propagandists for the defendants, to promote and support defendants and their objectives, to help achieve their acceptance and to attack all those who oppose them; and also, to promote and enhance the reputations and desirability of their horses in relation to those of plaintiffs and other horsemen.

11 G. ATTACKS ON PLAINTIFF HBPA. The defendants have attempted to restrain and restrict the activities of the plaintiff HBPA and have hampered it in its activities on behalf of the horsemen as their spokesman and representative, in problems which they have had with track management. They have attempted to interfere in the internal workings of the

HBPA, to influence its elections, to divide its membership and to promote rival organizations at its expense, for the purpose of emasculating it and eliminating an effective and independent organization through which the horsemen can be represented in their dealing with the tracks and which might oppose their objectives and desires.

H. EMPLOYMENT POLICIES. The defendants hire and employ all persons engaged in the management of racing at their tracks in New York, as described in Paragraphs ELEVENTH, TWELFTH, and THIRTEENTH herein, who control and influence all horsemen's racing activities, their prospects for success, the value of their horses and their earnings. Defendants have confined such appointments to persons previously associated with them, who are willing to and do, aid them in furthering the conspiracy herein alleged by favoring them unfairly at the expense of other horsemen, to such an extent, that all other sources of such personnel have been discouraged and eliminated in the State of New York, and defendants have asserted and threatened that if their right to appoint and employ such personnel is interfered with then, as a result of the unavailability of qualified people, caused by them as aforesaid, there can be no racing at the major racetracks in New York for a substantial period of time.

FORTY-FIFTH: That the results and impact of the conspiracy and actions of the defendants hereinabove described

are not confined to the specifically named plaintiffs herein, but affect the interests of numerous other horsemen racing in New York and elsewhere in the eastern United States, who will benefit by this action and who have no other means of redress; they constitute a class and kind of person with which the plaintiffs are identified and whose interests coincide.

WHEREFORE, plaintiffs demand judgment as follows:

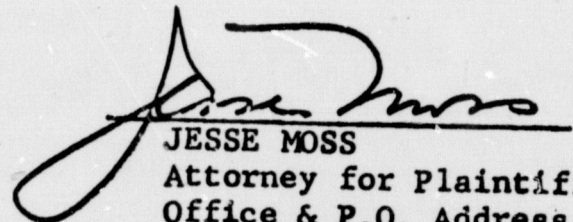
1. That the acts of the defendants hereinabove described, violate the anti-trust laws of the United States, in that they create and/or tend to create a monopoly, restrain trade, and restrict and interfere with fair competition in the sport and industry of racing, and give defendants unfair competitive advantages over plaintiffs and other persons engaged therein.

2. That the defendants be enjoined and restrained from conspiring and/or engaging in acts and conduct causing or tending to cause such monopoly, restraint of trade, and unfair competition.

3. That all of the defendants above named who are in the business of racing horses and engage in such activity at the Aqueduct, Belmont and Saratoga racetracks in New York, be ordered and directed to divest themselves of all ownership, control or participation in the operation and affairs of such

racetracks and of any interest as an officer, director or member of the defendants Jockey Club, NYRA and/or any other organization exercising influence or control over the conduct of racing at those tracks.

4. That the damages suffered by plaintiffs by reason of the wrongful acts of the defendants herein complained of, be ascertained, and judgment awarded in favor of the plaintiffs and against the defendants, for three times the amount of said damages, together with the costs and disbursements of this action and reasonable attorneys' fees.



JESSE MOSS

Attorney for Plaintiffs
Office & P.O. Address
743 Fifth Avenue
New York, New York 10022
202 Plaza 2-0740

ANSWER TO AMENDED COMPLAINT (Filed May 1, 1970)
 UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

----- x
 RAYMOND E. KARLINSKY, HOWARD JACOBSON,
 HARRY M. HATCHER, and HORSEMEN'S
 BENEVOLENT AND PROTECTIVE ASSOCIATION,
 INC., on behalf of themselves and all
 others engaged in the business of own-
 ing, training and racing thoroughbred
 horses who are similarly situated,

Plaintiffs,

-against-

THE NEW YORK RACING ASSOCIATION, INC.,
 JOCKEY CLUB, JAMES C. BRADY, GEORGE D.
 WIDENER, JOHN C. CLARK, JACK J. DREYFUS,
 JR., WALTER D. FLETCHER, JOHN G. GALBREATH,
 FRANK M. BASSEL, G. H. BOSTWICK, CHRISTOPHER
 T. CHENERY, HARRY F. GUGGENHEIM, JOHN W.
 HANES, FRANK L. KERNAN, ROBERT J. KLEBERG,
 JR., JOHN A. MORRIS, PERRY R. PRASE, OGDEN
 PHIPPS, JOHN M. SCHIFF, GERARD S. SMITH,
 ALFRED G. VANDERBILT, JOSEPH WALKER, JR.,
 and JOHN H. WHITNEY,

Defendants.

----- x

ANSWER

69 Civ. 4082

4/20/71 BF
 not entered
 JAH

Defendants, by their attorneys, Cahill, Gordon,
 Sonnett, Reindel & Ohl, for their answer to the amended complaint
 herein, allege as follows:

FIRST DEFENSE

1. With respect to the allegations contained in
 paragraph "FIRST" of the amended complaint, admit that the

amended complaint purports to be filed and the jurisdiction of this Court purports to be invoked under 15 U.S.C. §§ 15 and 26, admit the allegations contained in the second sentence of said paragraph and deny each and every remaining allegation contained in said paragraph.

2. With respect to the allegations contained in paragraph "SECOND" of the amended complaint, admit that pari-mutuel thoroughbred racing is authorized and engaged in in the State of New York, that racing dates do not necessarily coincide in all of the states in which pari-mutuel thoroughbred racing is engaged, that certain owners of thoroughbred horses do not confine their thoroughbred racing activities to one locality, that the winning of purses by race horses depends upon their success in their competition with other race horses, and that if a horse places first, second, third or fourth in a race it wins part of the purse money, and deny knowledge or information sufficient to form a belief as to the remaining allegations contained in the first three sentences of said paragraph. Defendants deny the allegations of the last sentence of said paragraph, except admit and allege that the money distributed as a purse in a single race goes to the owners of the horses which place first, second, third and fourth in such race and that of the aggregate amount of money distributed in all purses during a particular meeting or season portions may be paid to all of the owners whose horses compete during such meeting or season.

3. Admit the allegations of paragraph "THIRD" of the amended complaint.

4. Admit the allegations of paragraph "FOURTH" of the amended complaint, except deny that substantially all of the racing in the State of New York is conducted at Aqueduct, Belmont Park and Saratoga racetracks.

5. Admit the allegations contained in the first sentence of paragraph "FIFTH" of the amended complaint, except allege that the name of the defendant referred to is The Jockey Club, and deny each and every allegation of the second sentence of said paragraph except admit that The Jockey Club publishes the American Stud Book and refer to Title 21 of the Unconsolidated Laws of the State of New York and the Rules and Regulations of the New York State Racing Commission for the powers and duties of The Jockey Club.

6-7. Deny each and every allegation of paragraphs "SIXTH" and "SEVENTH" of the amended complaint.

8-9. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs "EIGHTH" and "NINTH" of the amended complaint, except deny that The Jockey Club owns or controls Record Publishing Company, Inc. as alleged in paragraph "NINTH".

10. Deny each and every allegation of paragraph "TENTH" of the amended complaint.

11. Admit the allegations of paragraph "ELEVENTH" of the amended complaint, except refer to the Rules and Regulations of the New York State Racing Commission for the powers and duties of the stewards and the placing judges.

12-13. Deny each and every allegation of paragraphs "TWELFTH" and "THIRTEENTH" of the amended complaint, and refer to the Rules and Regulations of the New York State Racing Commission for the powers and duties of the employees referred to in said paragraphs.

14. Admit the allegations of paragraph "FOURTEENTH" of the amended complaint, except deny the existence of any conspiracy as alleged in the amended complaint.

15-16. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs "FIFTEENTH" and "SIXTEENTH" of the amended complaint.

17-42. Admit the allegations of paragraphs "SEVENTEENTH" through "FORTY-SECOND" of the amended complaint, except allege that James C. Brady is not presently Chairman of the Board of Trustees of The New York Racing Association Inc., and that defendant Harry F. Guggenheim is deceased; deny that defendants James C. Brady, G. H. Bostwick, John W. Hanes and John A. Morris have ownership interests in breeding farms, deny each allegation in paragraphs "THIRTY-EIGHTH" through "FORTY-FIRST" relating to ownership of interests in breeding farms, and deny any allegation that the positions held by,

and the activities of, the persons referred to constitute or are the result of any conspiracy or any violation of any rule or statute.

43. With respect to the allegations of paragraph "FORTY-THIRD" of the amended complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegations preceding the semi-colon in said paragraph, and deny each and every remaining allegation of said paragraph.

44. Deny each and every allegation of paragraphs "FORTY-FOURTH" and "FORTY-FIFTH" of the amended complaint.

SECOND DEFENSE

45. The plaintiffs' claims herein are barred in whole or in part by the applicable statute of limitations.

THIRD DEFENSE

46. None of the plaintiffs herein has been injured in his business or property within the meaning of Section 4 of the Clayton Act (15 U.S.C. § 15).

THIRD DEFENSE

47. The named plaintiffs herein do not satisfy any of the prerequisites of a class action or any of the requirements for a class action to be maintainable under Rule 23 of the Federal Rules of Civil Procedure, and the amended complaint fails to comply with the requirements of Rule 11A of the Civil Rules of this Court.

WHEREFORE, defendants request that a judgment be entered by this Court dismissing the plaintiffs' claims herein and for such other and further relief as this Court should deem just and proper, including the costs of this action.

CAHILL, GORDON, SONNETT, REINDEL
& OHL

BY David P. Hyde
A Member of the Firm
Attorneys for Defendants
Office and P.O. Address:
80 Pine Street,
New York, New York 10005
(212) 944-7400

Dated: New York, New York
April 20, 1971.

NOTICE OF MOTION (Filed March 6, 1974)
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

RAYMOND E. KARLINSKY, HOWARD :
JACOBSON, HARRY M. HATCHER and :
HORSEMEN'S BENEVOLENT AND :
PROTECTIVE ASSOCIATION, INC., etc., :

Plaintiffs, :

-against- :

THE NEW YORK RACING ASSOCIATION, :
INC., et al., :

Defendants. :

NOTICE OF MOTION

69 Civ. 4082 (W.K.)

PLEASE TAKE NOTICE that, upon the Memorandum of Law submitted herewith, and upon the affidavits of Jesse Moss, Esq., sworn to March 1, 1974 and Sue Wimmershoff-Caplan, Esq., sworn to on March 1, 1974, and Eugene Jacobs, duly sworn to, the undersigned will move before the Honorable Whitman Knapp, a judge of this court, at the United States Courthouse, Room 110, Foley Square, New York, New York on the 8th day of March, 1974 at 2:00 p.m. of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 23 of

the Federal Rules of Civil Procedure, determining that this action may be maintained as a class action

Dated: New York, New York
March 1, 1974

Yours, etc.

JESSE MOSS

By: _____
JESSE MOSS
Attorney for Plaintiffs
743 Fifth Avenue
New York, New York 10022
(212) 752-0740

TO:
CAHILL, GORDON & REINDEL
80 Pine Street
New York, New York 10005

AFFIDAVIT OF JESSE MOSS IN SUPPORT OF MOTION
 UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

 RAYMOND E. KARLINSKY, HOWARD :
 JACOBSON, HARRY M. HATCHER, :
 and HORSEMEN'S BENEVOLENT AND :
 PROTECTIVE ASSOCIATION, INC., :
 on behalf of themselves and all :
 others engaged in the business :
 of owning, training and racing :
 thoroughbred horses in the United :
 States, who are similarly situated, :

Plaintiffs, :

-against- :

THE NEW YORK RACING ASSOCIATION, :
 INC., JOCKEY CLUB, JAMES C. BRADY, :
 JOHN C. CLARK, JACK J. DREYFUS, JR., :
 WALTER D. FLETCHER, JOHN G. GALBREATH, :
 FRANK M. BASIL, G. H. BOSTWICK, :
 CHRISTOPHER T. CHENERY, HARRY P. :
 GUGGENHEIM, JOHN W. HANES, FRANCIS :
 KERNAN, ROBERT J. KLEBERG, JR., :
 JOHN A. MORRIS, PERRY R. PEASE, :
 OGDEN PHIPPS, JOHN M. SCHIFF, :
 GERARD S. SMITH, ALFRED G. VANDERBILT, :
 JOSEPH WALKER, JR., and JOHN H. WHITNEY, :

Defendants. :

STATE OF NEW YORK) ss.:
 COUNTY OF NEW YORK)

JESSE MOSS, being duly sworn, deposes and says:

I am the attorney for the plaintiffs above named,

have been in charge of this action for them since its inception and am familiar with the facts upon which it is based. I make this affidavit in support of plaintiff's motion under Rule 23 for an order permitting this action to proceed as a class action.

The complaint, which was sustained by the District Court upon a motion to dismiss, alleges acts by the defendants in violation of the anti-trust laws, to their own benefit and to the damage of the plaintiffs. It alleges that the defendant, the New York Racing Association and the Jockey Club, as well as the trustees (board of directors) of the New York Racing Association, control racing in the State of New York and through that control have in a series of anti-competitive actions, unfairly and unlawfully benefited themselves in their separate and individual capacity as horse owners, at the expense of their competitors, the other horsemen racing against them at the New York tracks.

The Plaintiffs are two individual horsemen racing in New York and the Horsemen's Benevolent and Protective Association which represented most of the horsemen at the relevant times, suing on their own behalf as well as on behalf of all horsemen racing in this area, all of whom,

as will be seen, are similiarly situated and affected. The right of the HBPA to sue as a representative and its standing to do so, were sustained along with that of the other plaintiffs, after having been attacked on the motion to dismiss the complaint.

The practices engaged in by the Defendants, alleged to be discriminatory and giving competitive, and therefore, financial, advantages to the defendants over other horsemen, are set forth in more detail in the complaint and in the trial memorandum submitted by plaintiffs to this Court (copies are annexed).

It seems clear that the requirements necessary to maintain a class action are met in this case; perhaps it is even fair to say that this case particularly and peculiarly justifies a class action. Racing is basically a group activity. The various horsemen at the tracks engage in group contests for the prizes or purses which are offered and no income can be earned except at the expense of other and unsuccessful contestants. There is not, and cannot be, any individual course of action or separate rules for each separate individual. The group rules and their application applies to the group and if

racing is conducted in a manner which gives competitive advantages to one segment of the horsemen, this necessarily damages all the others accordingly and damages them as a group.

It follows from this that the question of law and fact raised by the complaint are common to all members of the class, and that the claims and defenses of the plaintiffs are not only typical of, but indetical with, those of the class. That the action taken by the representative parties will fairly and adequately protect the interests of the class is further assured (1) by the fact that, as previously shown, those interests are identical and (2) by the fact that one of the plaintiffs, HBPA, is an association which has long acted as the representative of most of the horsemen, whose action could not and would not have been taken in the first place, without the consent of a majority of the class which we are discussing. With respect to numbers, while no actual figures are available, it is fair to say that several thousand are involved, clearly meeting the requirements of that portion of the rule.

Although the rule then goes on in subdivision (b)

to listing other requirements in the alternative, so that anyone would be sufficient, the fact of the matter is that this action meets almost all of them.

Thus with respect to (b) (1) (A), since the methods of conducting racing are necessarily imposed upon the group, it would be impossible for an individual to bring an action which would not affect the group as a whole. Separate actions by various individuals who might complain because of effects of some particular action of defendants upon them rather than upon all, or who might be more interested in the potential effect of certain aspects of the conduct of the defendants than of other, could result in adjudications which would condemn certain activities of the defendants and not prohibit others. The result of such individual adjudications, or a series of them could permit standards of conduct tailored to an individual idea and then, nevertheless, be imposed upon all and could impede this action of the class in defining and restraining the kind of conduct which necessarily affects all members of the class. All individual members would be benefited by the result of a class action. The reverse is true.

To repeat, the horsemen in this case are necessarily

a group and must be treated as such. In the very nature of the activity there cannot be separate standards and courses of conduct for dealing with individual horsemen and a series of individual cases affecting certain particular aspects of Defendants' conduct, while leaving others untouched. This would not only impede an action brought for the benefit of the entire group, but would lead to an impossible situation. Accordingly, this class action is proper under (a)(1)(A) and (B).

With respect to (b)(2) it is perfectly clear that the actions are and must be applicable to the class as a whole because of the nature of racing as described.

This action is also appropriate under (b)(3). Obviously, an action of this nature, scope and expense, with its universal applicability should be a class action. Not only do common questions of law and fact predominate; they are identical. The interests of the individual in this case are the same as the interest of the group or class and in fact the damages accruing to each member of the class would be a portion of the general group damage which is the basis of the action here. This is in contrast to class actions based upon an aggregate of separate claims. This litigation covers all rights accruing to all members of the group. There appears

to be no other action or type of action as suitable to protect their common interests, nor has anyone ever suggested that there was.

The desirability of having this action concentrated in one forum seems to be clear. The activities complained of are concentrated in small and recognizable area and these issues should and actually must be decided for the class in one forum if hopeless confusion is to be avoided.

With respect to the difficulties to be encountered in the maintenance of this action, it seems almost obvious that they would merely be compounded if individual members of the class should decide to bring a series of actions (which in any case none of them have indicated any desire to do), not only because of the expense involved for an individual but because of the added difficulty of separating the impact of the anti-trust violations upon one plaintiff as compared to another instead of showing their impact upon the horsemen as a group.

Because of the nature of racing we again state that this is a classic case in which a class action is indicated.

Apart from having met the specified requirements

for a class action, the decision on the part of the HBPA to join in commencing this suit gives assurance that bringing it was, in fact, an expression of the desire of the class involved. The HBPA is a horsemen's organization having a separate New York division as it has in other areas of the country. As indicated in the affidavit of Eugene Jacobs submitted herewith, during the times in question it probably represented about 90% of the horsemen racing here. The term horsemen refers to owners and trainers. Trainers (perhaps a majority of them) frequently also own horses besides training for others. In any case, every horse on the grounds regardless of by whom owned must, under the rules of the Racing Commission, be under the management of a licensed trainer.

The HBPA has normally been recognized by the defendant, New York Racing Association, as the spokesman for the horsemen in any discussions, disputes or arrangements which have required solution. This has also been true of the Racing Commission. Thus the defendants themselves in submitting a memorandum as Amici Curiae in another case involving some of the same parties said that, "most of the trainers" were members of the HBPA. In their pretrial

memorandum here they say: (p.2) "Many of the owners and trainers with horses stabled at Aqueduct at that time were members of the HBPA." They said the same in their memorandum on the motion to dismiss in this case, and went on to allege that because of the position of the HBPA all racing stopped at Aqueduct during a dispute over a pension plan, thus not only admitting, but asserting, the response of the vast majority of horsemen to the HBPA.

In negotiations concerning a pension plan a few years ago, both the New York Racing Association and the Racing Commission dealt with the HBPA as representative of the horsemen and the same was true in 1967, according to the testimony of the president of the HBPA in a recent trial involving some of the same parties but other issues.

Also up to the time of these disputes among the parties, the New York Racing Association also recognized the legitimacy of the HBPA as the voice of the horsemen, by accepting authorizations from most of the horsemen, pursuant to which it deducted for the HBPA one percent of the purses won by them as their dues payments toward the support of HBPA. It appears clear, therefore, that the action taken by NYRA is in itself an indication of substantial support by the

class on whose behalf these plaintiffs sue.

With respect to the question of notice. The notice mentioned in the rule refers to actions maintainable under (b) (3). Since this case qualifies as a class action under (b) (1) and (2) as well, the form of notice is subject to the facts and circumstances of our particular case.

To begin with, the Courts have held, as indicated in our accompanying memorandum, that if a case is appropriate as a class action under (b) (1) as well as (b) (3) it is preferable to proceed under (b) (1) where the action and the damages are based upon an injury to the group as a whole, rather than (b) (3) which tends to be identified with class actions which are brought as such upon the basis of an aggregate of individual damages. We think we have indicated that not only is this good law but that also in fact the group injury is the gravamen of the action here.

In addition, in this case the giving of a notice would seem to be superfluous. As the affidavit of Mr. Eugene Jacobs attached hereto indicates, it is unlikely that there is a single horseman racing in New York, who is unaware of this and other actions and disputes between the parties hereto.

It has been the subject of mass meetings of horsemen during which deponent, among others, has explained this action to the horsemen. It has also been discussed at meetings of the HBPA, comprising, we remind the Court, the vast majority of horsemen. As also indicated in the Jacobs affidavit, it has been a constant subject of discussion among the horsemen at the New York tracks since its inception and has had frequent and substantial coverage in the newspapers.

We call to the Court's attention, that practically every horsemen in the business regularly reads the Daily Racing Form and any notice appearing in it would serve the purpose of notifying the class of the particulars of this lawsuit, (Jacobs affidavit). As the accompanying memorandum indicates, this has been held to be a satisfactory form of notice. Especially in this case, with the thousands of people involved, it is the only practical form to be used.

If the Court does not agree that this is an exceptional case in which individual notice can be dispensed with, then the most satisfactory way to notify the class members who can be identified with reasonable effort would be to notify substantially all of the HBPA members in 1968, as

indicated by their records. As stated by Mr. Jacobs, they comprised about 90% of the horsemen racing in New York during relevant times. On the other hand, if Defendants have a list of trainers in the New York area at or about that time, and agree to furnish it promptly, we would be willing to use their list.

There has been some discussion of the fact that this motion has not been made previously, and it is true that it could have been, but it is respectfully suggested that this is of minor significance here.

In the first place, the rule itself provides that order in a class action, such as this one, are provisional and not conclusive and it specifically contemplates that they may be altered or amended from time to time as the situation and the evidence develop and warrant. The issuance of orders, their continuance, amendment and/or supplementing from time to time as circumstances warrant is a continuing process, apparently intentionally notified to any rigid time schedule or particular stage of the proceedings, with some indication that its form and nature may be affected by the evidence at the trial itself. It would appear, therefore, that the fact

that this particular order could have or perhaps even should have been made earlier (although an explanation of this follows) is not an overriding consideration here. This view is strongly supported by the cases as more fully discussed in our memorandum, (p.4).

Secondly, it appears clear that the defendants' are not in any way prejudiced by the timing of this motion. Defendants have applied to the Court for an even substantially longer delay. Their difficulty with the making of the motion at this time can only be that it doesn't delay things enough for them. Under the circumstances, surely the timing of this motion causes no discomfort to defendants and their cries of anguish on this score are not convincing.

The delay has had one positive result which should aid the Court in its consideration. Enough time has elapsed to make it clear that most of the discussion about the possibility of separate individual suits and the effect they might have upon this action and vice versa, is moot. As might have been expected the complexity, scope, difficulty and expense of such an action if it is to be properly conducted, was a practical bar to separate individual suits. An additional consideration

resulting from this is that it has become apparent that if any relief at all is to be afforded from the alleged violations, it can and will be, only as by means of this action.

There has been a series of reasons why this motion has not been made before, which affect the definition of "as soon as practicable". Two motions were made attacking the sufficiency of the complaint (eventually upheld) which of course, was brought as a class action. Thereafter, the question of whether it was properly brought as a class action was raised before the District Court on a motion for discovery and the Court rejected its necessity, at least at that time. Thereafter, when the question came up before the Magistrate, defendants claimed that compliance with both Local Rule 11(A) and FRCP 23 was necessary. Since Rule 11(A) took effect after the commencement of this action, it was decided that it has no application and the matter was dropped and not immediately reconsidered again solely with respect to FRCP 23.

Thereafter, at the suggestion of Magistrate Jacobs, an effort was made to get a pretrial order drawn and signed, and we submitted one which contained a statement of this as a class action. The making of that pretrial order pursuant to Rule

FRCP 16 was obstructed by the objection of the defendants who stated in letters to us that they did not consider that they should go ahead with a pretrial order until after final discovery was had. (D. Hyde 1/16/73, R. Fine 4/25/73) After further discussions with the Magistrate, it was decided that the parties could not agree with a pretrial order and it was dispensed with the Magistrate, without objection from either party.

A number of other questions arose before the Magistrate with respect to evidence, discovery and other procedural matters, most of which were disposed of in an informal way without the making of formal motions.

As the affidavit of Sue Caplan annexed hereto, indicates, we were under the impression that a formal motion would probably not be necessary for the making of this class order. Presumably, this could have happened in that manner, since the order required by the rule could have been made upon the basis of informal discussion before the Magistrate. Neither side has made a motion before this, although either could have done so, although we realize that plaintiffs' interest in bringing the action to trial as soon as possible,

should have prompted us to bring on a formal motion sooner. The Magistrate's discussion of our attitude as "casual" is not entirely unjustified but it is suggested that nothing has been done here which in anyway goes to the merits of the action or the convenience of the parties, and we again respectfully suggest that the decision on this motion should not be substantially affected by its timing particularly in view of the informal language of the rule itself which we have previously mentioned, and the cases discussed in our memorandum.

Sworn to before me this

1st day of March, 1974.

JESSE MOSS

AFFIDAVIT OF SUE WIMMERSHOFF-CAPLAN IN SUPPORT OF MOTION
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAYMOND E. KARLINSKY, HOWARD JACOBSON,
HARRY M. HATCHER and HORSEMEN'S
BENEVOLENT AND PROTECTIVE ASSOCIATION,
INC., etc.,

Plaintiffs,

-against-

THE NEW YORK RACING ASSOCIATION,
INC., et al.,

Defendants.

AFFIDAVIT

69 Civ. 4082 (W.K.)

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

SUE WIMMERSHOFF-CAPLAN, of counsel to JESSE MOSS,
attorney for the Plaintiffs herein makes the following affi-
davit in support of the motion for an order pursuant to FRCP
23 permitting this matter to proceed as a class action. I
am thoroughly familiar with this matter, having dealt with
all aspects of this case since its inception.

This case, filed in September, 1969, was challenged
by motions to dismiss, and the amended complaint was upheld
by Judge Lasker in March of 1971. Plaintiffs immediately pro-

ceed with pre-trial work, taking the depositions of eleven witnesses, several of these in more than one session. Plaintiffs also answered and completed extensive interrogatories addressed to Plaintiffs Howard Jacobson and Horsemen's Benevolent and Protective Association, consisting of 22 pages of questions, a many relating to various aspects of the class action, which were duly answered.

At various points in the preliminary litigation there were discussions regarding the maintenance of this matter as a class action:

1. The question was raised for the first time in Roger Fine's affidavit of April 21, 1971 opposing motions for examinations before trial, where he stated:

The amended complaint purports to set forth a class action pursuant to F.R.C.P. Rule 23 under the federal antitrust laws on behalf of all persons who own, train and race thoroughbred horses in the State of New York. However, plaintiffs have sought no judicial determination that it is maintainable as a class action. The procedure contemplated by Civil Rule 11A of the Rules of this Court would seem to require plaintiffs to obtain resolution of the far-reaching class action issues before embarking upon extensive discovery.

Judge Motley ordered that the discovery proceed nevertheless and made no specific determination with regard to Rule 23.

2. In the October of 1972, the parties were informed that in accordance with the Southern District's new Individual Calendar practice the case was assigned to Judge Knapp, and a first pre-trial conference was held on October 27.

3. In December of 1972, in an effort to bring the matter to trial, the Plaintiffs submitted to the Magistrate and to the Defendants a Proposed Pre-Trial Order clearly describing this as a class action brought on behalf of horsemen in the New York area. (Plaintiffs' Proposed Pre-Trial Order, ¶7, p.6) Plaintiffs were never successful in obtaining Defendants cooperation for submission of such an order to the Court which would have required settlement of this issue at that point.

4. On May 2, 1973, the Defendants brought up the question of Rule (11)(A) in a pre-trial conference before Magistrate Jacobs, and we replied by affidavit that it appeared the Defendants were seeking to apply rule (11)(A) retroactivity. No formal decision was rendered on the matter.

5. The question was also brought up at the next pre-trial conference before Magistrate Jacobs on December 12, 1973. There was again a discussion as to whether or not Rule (11)(A) could be applied retroactively and whether there are any cases which do so. Magistrate Jacobs said that he would look into the matter, but no formal decision or recommendation was made.

Sworn to before me this 15th
day of March, 1974.

SUE WIMMERSHOFF-CAPLAN
Notary Public, State of New York
No. 31-433-010
Qualified in New York County 76
Commission Expires March 30, 1976

SUE WIMMERSHOFF-CAPLAN

AFFIDAVIT OF EUGENE JACOBS IN SUPPORT
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
RAYMOND E. KARLINSKY, HOWARD JACOBSON, :
HARRY M. HATCHER and HORSEMEN'S :
BENEVOLENT AND PROTECTIVE ASSOCIATION, :
INC., etc., :
:

Plaintiffs, :

AFFIDAVIT

69 Civ. 4082 (W.K.)

-against-

THE NEW YORK RACING ASSOCIATION, INC., :
et al., :

Defendants. :
-----x

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

EUGENE JACOBS, being duly sworn, deposes and says:

I have been President of the New York Division of the Horsemen's Benevolent Protective Association for three years. Prior to that I was an active member and a Director of the New York Division for approximately ten years.

I am an owner-trainer and have raced principally at the New York tracks for over twenty-five years, during which time I have continually interested myself in horsemen's affairs and dealings with the tracks, as well as engaging in my normal and active occupation as a horseman. As a result of this I am familiar not only with the activities of the HBPA but with most matters concerning the

conduct of racing in New York.

This lawsuit arose a number of years ago, as a result of a series of disputes and disagreements between the NYRA and the HBPA acting as representative of the horsemen. With respect to this action I should like to inform the Court that it, as well as the other actions commenced, were discussed at numerous meetings, some of which were meetings of the HBPA and others open meetings to which all horsemen were invited and which large numbers attended. It is unlikely that there is a single horseman racing at the New York tracks who does not know of this and other lawsuits involved. Not only was it explained at meetings but for a long time it was an inevitable subject of discussion among horsemen at the New York tracks. The newspapers also have covered it frequently and at length.

During any given year probably two thousand or more horsemen race at the New York tracks. The number is not constant, stables come and go at different times during the season. Over the ten year period involved in this action there must be at least three or four thousand different horsemen who raced here at one time or another. While our records are not and cannot be exact, I believe it to be true that during the period preceeding the commencement of this action, close to 90% of the horsemen racing here

(owners and trainers) were members of the HBPA. Membership dues were paid by a contribution of one percent of winnings and the position of HBPA as representative of the vast majority of horsemen was recognized by an arrangement with the NYRA, pursuant to which it sent forms to owners and trainers authorizing it to routinely withhold payments to HBPA which it turned over to the latter.

While it is true that since these disputes between the NYRA and HBPA, some effort has been made by the former to build up other organizations, two things must be noted: First, up to the time of the commencement of these actions HBPA was regarded both by the horsemen and management as truly authorized to speak for the horsemen. In fact it was recognized in that capacity by the New York Racing Commission as well when problems rose before it. It might be noted that even now despite efforts of the NYRA, HBPA is the only organization considered by the horsemen as their representative.

It has come to my attention that a question has arisen with respect to the possibility of notifying horsemen of some of the details of this action. I should like to inform the Court that the Daily Racing Form, which as its title indicates, is devoted to the sport,

is read by everyone connected with racing and there is no better or surer way of making certain a notice directed to the horsemen comes to their attention than in that newspaper.

If it is decided that the horsemen should be notified individually, there is an easy and efficient method of accomplishing this. All of the horse owners must and do have a trainer who is in charge of their horses at the race-track and who generally acts, on their behalf as agent, in all of the details of the racing operation, such as obtaining stalls and most bookkeeping transactions.

Because of the very nature of the racing business, during the racing season all the trainers are in the same place at the same time and can be fairly easily and completely reached. Therefore, a notification to all of the trainers now at Aqueduct or Belmont would be notification to substantially the entire class; i.e., horsemen who customarily race in New York.

Sworn to before me this 7th
day of March, 1974.

JESSE MOSS
Notary Public, State of New York
No. 31-4513249
Qualified in New York County
Commission Expires March 30, 1975

EUGENE JACOBS

AFFIDAVIT OF KENNETH NOE IN OPPOSITION
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
RAYMOND E. KARLINSKY, HOWARD :
JACOBSON, HARRY M. HATCHER and :
HORSEMEN'S BENEVOLENT AND PROTECTIVE :
ASSOCIATION, INC., etc., :

Plaintiffs, :

-against- :

THE NEW YORK RACING ASSOCIATION, :
INC., et al., :

Defendants. :

----- x

AFFIDAVIT

69 Civ. 4082
(W.K.)

STATE OF NEW YORK)
COUNTY OF QUEENS) ss.:

KENNETH NOE, being duly sworn, deposes and says:

1. I am the Racing Secretary for the New York Racing Association Inc. ("NYRA"). I submit this affidavit in opposition to plaintiffs' motion to determine that this action may be maintained as a class action.

2. I am responsible for the allocation of stall space at the NYRA's tracks and for preparation of the racing program, including the preparation of the stakes schedule as well as the scheduling and writing of the eligibility requirements (known in racing as the "conditions") for all of the races. The contentions of the plaintiffs that thoroughbred horse racing is a "group activity" and that "there cannot be separate

standards for dealing with individual horsemen" (Moss Aff't pp. 3 and 5), are completely unfounded.

Allocation of Stall Space

3. The NYRA provides complimentary stall space at its tracks during the racing season. There are approximately 2,000 stalls at Aqueduct and Belmont combined. Trainers are required to submit applications for stall space on forms provided by the NYRA. There are three application periods -- one for the Spring meetings at Aqueduct and Belmont, one for Saratoga, and one for the Aqueduct-Belmont Fall meetings. There are many more applications than there is stall space, necessitating a selection process. The object of this process is, of course, to allot stalls to the best horses. The theory is that the better the horses that compete at a track, the more people are attracted to the races and the more money is wagered. This system benefits the track because it produces more revenue, and benefits the horsemen because more revenues mean there will be more money for purses.

4. Allocation of stall space is done on an individual basis. I review the stall applications not only trainer by trainer, but horse by horse. Stalls are allocated to particular horses. Thus, a trainer may list twelve horses on his application, but I may, for example, assign stalls to only ten of those horses -- and it is those particular ten horses which the trainer ordinarily will bring to the track.

5. Most trainers (including those who train horses owned by defendants), obtain fewer stalls than they apply for. Moreover, many horses owned by defendants are trained by trainers who also train horses owned by members of the alleged class.

Allocation of Purse Money
and Programming of Races

6. The schedule of stakes races at NYRA's tracks are substantially the same from year to year -- and have been so for many years predating the alleged conspiracy in this action. Saratoga is the oldest racetrack in the United States and it enjoys the reputation among almost all horsemen for having the highest quality of horse racing in the country. The primary reason for this is that it has an historic, traditional schedule which includes some of the best known stakes races in the country. Only relatively minor changes are made in the stakes schedule each year.

7. Competition in stakes races is open to all horsemen on an equal basis. It is impossible to generalize about which group of persons has the most stake horses. There are defendants who own many stake-quality horses, and there are defendants who own few or, at various times since 1960, none at all. Conversely, there are horsemen who would be members of this class who own (and have owned) far more stake horses than the defendants and who have won far more stakes purses than the defendants. The two most famous and successful stakes horses

last year were Secretariat and Riva Ridge, owned by Mrs. Tweedy, who would be a member of this class. It could hardly be argued that the stakes races and purses worked to Mrs. Tweedy's disadvantage. Many such examples of ownership of stakes horses by class members (and lack of ownership of stakes horses by defendants) could be given.

8. I have been involved in some aspect of thoroughbred horse racing for almost my entire life. For purposes of this motion, the only generalization that could be made about race horses is that, like people, no two are alike. Owning and training race horses involves continuous individual decisions about particular horses, including personal judgments as to whether he is ready to run, what races to enter him in and, ultimately, whether or not to label him a "stake" horse and enter him in stakes races. In other words, different trainers frequently are unable to agree as to whether a particular horse is of "stakes" caliber.

9. For these reasons, it is respectfully submitted that any judicial decision as to whether any horse should have received a stall, or should or could have won a stakes purse, will provide no answers applicable to any other horse.

Sworn to before me this
7th day of March, 1974

Notary Public

ORDER DENYING CLASS ACTION APPLICATION
 UNITED STATES DISTRICT COURT (Filed May 2, 1974)
 SOUTHERN DISTRICT OF NEW YORK

MAY 2 1974

RAYMOND E. KARLINSKY, HOWARD
 JACOBSON, HARRY M. HATCHER and
 HORSEMEN'S BENEVOLENT AND PROTECTIVE
 ASSOCIATION, INC., etc.,

Plaintiffs,

- against -

THE NEW YORK RACING ASSOCIATION,
 INC., et al.,

Defendants.

MEMORANDUM AND ORDER

69 Civ. 4082

APPEARANCES:

JESSE MOGS, ESQ.
 Attorney for Plaintiffs
 743 Fifth Avenue
 New York, New York 10022
 By: Sue Wimmershoff-Caplan, Of Counsel

CAHILL GORDON & REINDEL
 Attorneys for Defendants
 80 Pine Street
 New York, New York 10005
 By: O. Carlyle McCandless
 David R. Hyde
 Roger S. Pine,
 Of Counsel

KHAPP, D.J.

The original complaint in this antitrust action was filed in September, 1969. An amended complaint was filed in April, 1970 pursuant to leave of the court. It is only now that plaintiff has moved that the action be made a class suit as required by Fed. R. Civ. Pro. 23(c). The defendant's principal opposition to the motion is based on the claim of undue delay.

Rule 23(c) states in part:

- "(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." (emphasis added)

The purpose of the quoted provision is to achieve early determinations of class parties so as to avoid prejudicing any party. See Frankel, "Some Preliminary Observations Concerning Civil Rule 23" (1967) 43 F.R.D. 39; Feder v. Harrington (S.D.N.Y. 1970) 52 F.R.D. 178. In Feder, as no prejudice resulted from a three-year delay in moving for class determination, the court found no basis for denying the motion. Yet on different facts the same judge found a three-year lapse sufficient grounds for dismissal of a Rule 23(c) motion Taub v. Glickman (S.D.N.Y. 1970) 14 Fr. Serv. 2d 847. In the latter action, the motion was not made until the parties had been notified pursuant to court rules that the case would appear on the Review Calendar. Judge Tenney found that the

motion had not been made "as soon as practicable", and that the delay was one indication that plaintiff was failing to vigorously represent the class.

The facts in this case are similar to those in Tanb. The plaintiff has delayed four and one-half years in making his motion, and has only moved after a pretrial conference. There has been no showing that this motion could not have been made at an earlier date. Rather, the delay here appears to have been caused solely by the failure of plaintiff to properly adhere to the mandates of Rule 23(c). Under such circumstances, this court finds that plaintiff has failed to meet the "as soon as practicable" test of the Federal Rule, and his motion is therefore denied.

SO ORDERED.

Dated: New York, New York

April 26, 1974


WHITMAN KNAPP, U.S.D.J.

TRANSCRIPT OF PROCEEDINGS BEFORE KNAPP, J.
DATED JULY 8, 9, 10, 15, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

RAYMOND E. KARLINSKY, et al.,	: Before:	
	: HON. WHITMAN KNAPP,	
Plaintiffs	: District Judge	
	:	
vs.	:	
	:	
THE NEW YORK RACING ASSOCIATION,	:	69 CIVIL 4082
INC., et al.,	:	
	:	
Defendants.	:	
	:	

-----X

New York, July 8, 9, 10, 15, 1974

STENOGRAPHER'S MINUTES

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 -----X

4 RAYMOND E. KARLINSKY, HOWARD JACOBSON, :
5 HARRY M. HATCHER, and HORSEMEN'S :
6 BENEVOLENT AND PROTECTIVE ASSOCIATION, :
INC., etc., :

7 Plaintiffs, :

8 - against -

: 69 Civ. 4082

9 THE NEW YORK RACING ASSOCIATION, INC., :
10 JOCKEY CLUB, JAMES C. BRADY, GEORGE D. :
WIDENER, JOHN C. CLARK, JACK J. DREYFUS, :
11 JR., WALTER D. FLETCHER, JOHN G. :
GALBREATH, FRANK M. BASIL, G. H. :
12 BOSTWICK, CHRISTOPHER T. CHENERY, :
HARRY F. GUGGENHEIM, JOHN W. HANES, :
13 FRANCIS KERNAN, ROBERT J. KLEBERG, JR., :
JOHN A. MORRIS, PERRY R. PEASE, OGDEN :
14 PHIPPS, JOHN M. SCHIFF, GERARD S. SMITH, :
ALFRED G. VANDERBILT, JOSEPH WALKER, JR., :
and JOHN H. WHITNEY, :

15 Defendants. :

16 -----X

17 BEFORE:

18 HON. WHITMAN KNAPP,

19 District Judge

20 New York, N. Y.

21 July 8, 1974 - 9:50 a.m.

APPEARANCES:

JESSE MOSS, Esq.

SUE CAPLAN

GEORGE CHADWICK, Esq.

Attorneys for Plaintiffs

CAHILL, GORDON, SONNETT, REINDEL & OHL, Esqs.
Attorneys for Defendants

BY: DAVID R. HYDE, Esq.

O. CARLYSLE McCANDLESS, Esq.

IRA FINKELSTEIN, Esq.

JAMES S. WRIGHT, JR., Esq.

wctb

3

THE COURT: You have a plaintiff who has defaulted and is being struck?

MR. HYDE: Yes, your Honor. We have a motion to dismiss with respect to plaintiff Harry M. Hatcher. Mr. Hatcher had consistently failed to appear for deposition noticed by the defendant. We understand from Mr. Moss that he has no further interest in prosecuting this lawsuit. We gather that there is no opposition to this motion. Accordingly, we ask that the complaint be dismissed with prejudice as to plaintiff Harry M. Hatcher.

MR. MOSS: That is correct, your Honor, we consent to it.

THE COURT: So ordered. Proceed.

MR. MOSS: If your Honor please, I would like to offer in evidence at this point the reports of the New York State Racing Commission and ask the Court to admit them -- the reports of the New York State Racing Commission from 1960 through 1970.

MR. HYDE: Your Honor, I have no objection to that, with one caveat, which will come up in the course of this trial, that is, with respect to going back as far as 1960. This action was commenced in September of 1969. Under the Clayton Act, there is a four-year statute of limitations, so that anything which may have occurred prior to September of

1 wctb

2 1965 would in our view be barred by the statute of limitations.
3 I don't know to what purpose these are being offered, whether
4 or not they may or may not be admissible. We have no
5 objection obviously to the authenticity of these official
6 records.

7 THE COURT: I suppose it might be admissible to
8 shed light on events after 1965. Something that happened in
9 1964 might shed light on something that happened in 1965.

10 MR. MOSS: Our theory very simply will be that this
11 was a continuing operation and it is all part of the same
12 operation, and that anything dealing with the genesis of the
13 conspiracy and of the NYRA and all the rest of it which would
14 lead up to the events would be relevant to that purpose.

15 THE COURT: All right. Are you going to mark
16 these as exhibits?

17 MR. MOSS: We probably are only going to use small
18 parts of them, but I thought we might save the time at this
19 point by getting them in.

20 (Plaintiffs' Exhibits 1 through 11 were received
21 in evidence.)

22 MR. MOSS: If your Honor please, we have subpoenaed
23 defendants' records consisting of bookkeeping accounts, which
24 are part of their records, indicating the winnings of the
25 two plaintiffs herein, the two individual plaintiffs, Mr.

1 wctb

2 Jacobson and Mr. Karlinsky, and I would like to introduce
3 those at this time.

4 MR. HYDE: That, your Honor, I think falls into a
5 different category. Records subpoenaed commence with the year
6 1960 and run through the year 1970. Even on the theory of
7 continuing offense, I see no basis upon which damages could
8 be predicated for any year earlier than 1965. We have no
9 objection to producing these records for the year 1965 to the
10 year 1970, but it seems to me the question of purses these
11 two plaintiffs may have won in earlier years is completely
12 irrelevant to this action. We would accordingly object to the
13 admission in evidence of any records of earnings prior to 1965.

14 MR. MOSS: If your Honor please --

15 THE COURT: I assume you would agree, Mr. Moss, that
16 they are not competent to show damages prior to 1965?

17 MR. MOSS: I would be inclined to have no
18 particular concern with that. I would like to make this as a
19 suggestion. For the time being I would accept those from
20 1965 on, and if later on it becomes important to us to argue
21 that point, I would like to reserve my right to do so.

22 THE COURT: All right.

23 MR. HYDE: Thank you, your Honor.

24 THE COURT: At this point, from 1965 on, is
25 received. I take it the others are in court pursuant to

2 subpoena?

3 MR. HYDE: Yes, they are, your Honor.

4 Your Honor, let me amend my last statement. I
5 understand from my assistants that records in the case of
6 plaintiff Jacobson were not available for the years prior to
7 1965, at least we could not locate them.8 MR. MOSS: I am not sure that will be important, your
9 Honor, and we can reserve that portion.10 THE COURT: All right. I just asked the question,
11 and he answered it incorrectly and now he is correcting it.

12 You do not have to wait while he is marking those.

13 MR. MOSS: If your Honor please, we have had an
14 arrangement with the defendants whereby, instead of
15 subpoenaing witnesses, we have told them the witnesses we
16 want and they have agreed to produce them, which in previous
17 trials they have done. There were three witnesses which were
18 to be and probably will be produced today. The one who is
19 here at present was not the one I intended to commence with
20 for purpose of background and genesis of the thing, but I am
21 going to call him anyway obviously. He is the only witness I
22 have at the moment and I do so with the explanation to your
23 Honor that at least part of what he says will be connected up.24 (Plaintiffs' Exhibit 12 through 21 were received
25 in evidence.)

wctb

Hyland - direct

7

NATHANIEL J. HYLAND, called as a witness in behalf of the plaintiffs, being first duly sworn, testified as follows:

THE COURT: Incidentally, in reading papers over the weekend, I discovered that John Hay Whitney is a defendant. He was a client of my firm. I wanted to clear that fact. He was not a personal client of mine but of my firm.

DIRECT EXAMINATION

BY MR. MOSS:

Q Mr. Hyland, are you connected with the New York Racing Association?

A No, sir.

Q Are you presently connected with the Jockey Club?

A Yes, I am.

Q In what capacity, please?

A I am steward appointed by the Jockey Club.

Q Do you have another position with the Jockey Club as well?

A I am Assistant Secretary of the Jockey Club.

THE COURT: What do you mean by steward appointed by the Jockey Club?

THE WITNESS: In racing, your Honor, there are three stewards. One is appointed by the State of New

1 wctb Hyland - direct 8

2 York, one is appointed by the Association, and one appointed
3 by the Jockey Club -- all with the approval of the State
4 Racing and Wagering Law.

5 THE COURT: I don't want anyone making the mistake
6 of assuming that I know anything about racing, except what I
7 have learned over the weekend. My ignorance is complete.

8 What do these stewards do?

9 THE WITNESS: We regulate racing under the guidance
10 of the rules set forth by the State Racing and Wagering Law.

11 Q Prior to your present position, Mr. Hyland, were
12 you connected with the New York Racing Association?

13 A Yes.

14 Q Would you trace that connection from your earliest
15 and first positions you had up to the time you became Jockey
16 Club steward.

17 A I worked in a horse identification -- at the time
18 when I started there were individual associations. They were
19 not in NYRA. There was Jamaica Race Track, Empire State,
20 Belmont Park, and Aqueduct, Saratoga.

21 Q About 1965 was it that NYRA was formed?

22 A I don't remember the exact date.

23 Q Approximately.

24 THE COURT: The time you started, when was that?

25 THE WITNESS: Roughly 1948.

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Hyland - direct

9

Q And you worked for one of the private associations which was then conducting racing in New York, is that correct?

A That is true.

Q Did there come a time when the New York Racing Association was formed which took over these private associations?

A Yes.

Q Does the New York Racing Association operate all racing in the State of New York now with the exception of Canandaigua?

A If you mean flat racing, yes.

Q Yes. That includes Aqueduct, Belmont and Saratoga, is that correct?

A Correct.

Q Is there a difference in the quality of racing at the New York Racing Association tracks and that held at Canandaigua?

A I have to say yes.

Q Would you explain that to us, please.

A The New York Racing Association tracks offer what we like to consider the best racing in the country. Canandaigua -- we also have a large population to draw from and our operation is big. Canandaigua is comparatively smaller. The quality of the horses is not as high as the

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Hyland - direct

10

2 New York NYRA horses, and the purses are smaller.

3 Q The purses are very substantially smaller, are
4 they not?

5 A I would have to say yes.

6 Q And the quality of the horses is substantially
7 different?

8 A Yes.

9 Q Would it be fair to put it this way: that the
10 big league racing in New York is conducted at the NYRA tracks?

11 A Yes.

12 THE COURT: That is as far as New York State is
13 concerned?

14 MR. MOSS: Yes, New York State.

15 Q Going back to the time when the New York Racing
16 Association took over racing in New York, always with the
17 exception of Canandaigua, would you trace your career with
18 the racing association, please?

19 A I had been working in Maryland. I worked all the
20 Maryland tracks and Delaware Park. And when I came back to
21 New York, I had a position with the NYRA.

22 Q Which was what, please?

23 A Assistant Racing Secretary and Handicap --
24 excuse me, I started off as Assistant Handicapper.

25 Q Assistant Handicapper?

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Hyland - direct

11

THE COURT: When did you come back?

THE WITNESS: I came back in 1959 and worked in the Jockey Club offices, and then accepted the position of Assistant Handicapper at the NYRA tracks.

Q Were you also Assistant Racing Secretary?

A The next year, the following year.

Q And you were that for a number of years as well, is that correct?

A Approximately ten years.

MR. HYDE: Could I ask if the witness would try to speak a little louder? I think it is difficult to hear back here.

Q For how many years were you Assistant Handicapper and Assistant Racing Secretary?

A Approximately ten years.

Q Whom did you work under?

A My immediate superior?

Q Who was the Racing Secretary and Handicapper during that time?

A In 1960 I am sure it was Jimmy Kilroe. Starting with 1961 it was Thomas Trotter.

Q And Mr. Trotter was the Racing Secretary until when, please?

A I think 1970.

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2 THE COURT: What is a Handicapper?

3 THE WITNESS: A Handicapper assigns weights to
4 horses in a particular type of race called a Handicap Race,
5 where the Handicapper does his best to put weight on horses
6 that would make the finish equitable, trying to get all the
7 horses finishing in the same place.

8 Q The Handicapper, as you just said, assigns weights
9 to horses to equalize their chances of coming out even?

10 A Yes, sir.

11 Q Is the Handicapper also usually the Racing
12 Secretary?

13 A Yes.

14 Q He uses his own judgment with respect to that,
15 is that right?

16 A After a lot of work, yes, sir.

17 THE COURT: What does the Racing Secretary do in
18 addition to handicapping?

19 THE WITNESS: He issues what is known as a
20 condition book -- well, he has various functions. I would say
21 his primary function would be to put on the best type of
22 racing at a race track that he can with the horses that he
23 has to work with.

24 If I could go a step further?

25 THE COURT: Yes.

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Hyland - direct

13

THE WITNESS: This is what is known as a condition book, your Honor (producing). It is usually put out a week or ten days before an actual race.

THE COURT: What the witness is showing me is the Aqueduct No. 1 Condition Book 1974 Summer Meeting.

MR. HYDE: Your Honor, we are still having difficulty back here hearing the witness.

Mr. Hyland, could you try to speak louder?

THE WITNESS: I'll try.

Q A Handicapper uses his best judgment in assigning weights to horses, is that correct?

A Yes, sir.

MR. HYDE: Excuse me. I think the witness was interrupted in defining the duties of the Racing Secretary. He started to respond to the Court's question, and I do not believe he finished that answer.

THE COURT: Go ahead. You got out this condition book.

THE WITNESS: Yes, sir. And it's issued, mailed to horsemen, and the horsemen read the races that are coming up and see what horses they have under their care that they can put in these races. Everything is done in advance.

Q To get back to handicapping for a moment, Mr. Hyland: The Handicapper assigns weights to horses --

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Hyland - direct

14

2 THE COURT: If you would stand back, he would tend
3 to talk to you and the rest of us. I can hear him but
4 apparently the others cannot.

5 Q The Handicapper assigns weights to horses in his
6 own best judgment, is that correct?

7 A Yes, sir.

8 Q The purpose of giving different weights to
9 different horses is what?

10 A To equalize the chance of every horse in the
11 handicap race.

12 Q If you put more weight on the horse you slow the
13 horse up?

14 A It tends to.

15 Q And conversely if you take weight off the horse it
16 tends to let the horse go faster?

17 A Correct.

18 Q And that is the theory of it, is it not?

19 A Yes, sir.

20 Q Would you say that the judgment of the Handicapper
21 in deciding what weights each horse ought to carry has a great
22 deal to do with the outcome of the race?

23 A Yes, sir.

24 Q Are there frequently differences of opinion with
25 respect to the amount of weight a horse ought to carry

wctb

Hyland - direct

15

compared to other horses?

A Frequently.

Q Do trainers and owners occasionally complain to the Racing Secretary about the way their horses have been handicapped?

A I can only speak with secondhand information. Yes. Mostly the trainers.

Q Mostly the trainers.

A Yes.

Q Does that include trainers who train for Jockey Club members and NYRA members as well as trainers for other owners?

A I can't speak from firsthand experience, but I would have to say: generally, yes.

Q Do different handicappers at different tracks also handicap the same horse differently from time to time?

A I am sure it has been done.

Q Who appoints the Racing Secretary and Handicapper, please, Mr. Hyland?

A The New York Racing Association. In New York you are talking about?

Q In New York.

THE COURT: I assume all these questions relate to New York only, so you do not have to state that.

1 wctb

Hyland - direct

16

2 MR. MOSS: Yes, your Honor. If on any occasion it
3 will be different it will be specified; otherwise that is
4 true.

5 Q With respect to the duties of the Racing
6 Secretary, does the Racing Secretary have with him in his
7 discretion, as a rule, the assignment of stalls?

8 A Usually he is part of a committee that assigns
9 stalls.

10 Q Mr. Kenneth Noe is now the Racing Secretary at the
11 NYRA tracks?

12 A Yes, sir.

13 Q And he has been for about three years?

14 A Yes, sir.

15 Q Prior to Mr. Noe's appointment there was a stall
16 committee, is that correct?

17 A Yes, sir.

18 Q Consisting of whom, please?

19 A Mr. Trotter, at one time David Carnihan, Pat
20 O'Brien.

21 Q Pat O'Brien occupies what position at the NYRA,
22 please?

23 A Vice-president.

24 Q In charge of racing operations, is that correct?

25 A I think so.

wctb

Hyland - direct

17

Q Since Mr. Noe came in, there has been no stall committee, is that correct?

A I don't know.

Q In any event, the Racing Secretary has either by himself or with the assistance of a stall committee allotted stalls; is that correct?

A Yes, sir.

Q What do you mean by allotting stalls, to get this on the record?

A Well, to use general figures, say we have 2,000 stalls. Before the race meet opens, applications are taken for stall space. We might have applications for a 5,000 or more horses. The stall committee decides which horses are assigned stalls. Actually he assigns a stall to the trainer, and the trainer makes adjustments in his own stable to figure out what horses come on the grounds.

Q Some trainers train exclusively for trustees of the New York Racing Association, is that correct?

A Yes, sir.

Q And other trainers train exclusively for members of the Jockey Club, is that correct?

A Yes, sir.

Q And other trainers are what is known as ~~puppet~~ ^{public} trainers who train for trainers at large?

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Hyland - direct

18

1 A And there are trainers that train exclusively for
2 nonmembers of the Jockey Club or nontrustees.
3

4 THE COURT: Are any who train for both?

5 THE WITNESS: Yes.

6 THE COURT: Nonmembers and members?

7 THE WITNESS: Yes.

8 THE COURT: Nontrustees and trustees?

9 THE WITNESS: Yes, sir.

10 THE COURT: So you have three categories of
11 trainers: those who train exclusively for members and
12 trustees, those who train exclusively for nonmembers, and
13 those who train for everybody?

14 THE WITNESS: A public stable, yes, sir.

15 THE COURT: Both members and nonmembers.

16 THE WITNESS: Yes, sir.

17 Q And the Racing Secretary assigns stalls, does he
18 not? He considers everybody's application: Jockey Club
19 members, NYRA members and nonmembers alike, he has control
20 over all requests; is that right?

21 A Yes, sir.

22 Q The Racing Secretary, by allotting stalls, admits
23 horses to the grounds; isn't that one of the things which he
24 accomplishes?

25 A Yes.

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Hyland - direct

19

Q And one of the things which he considers when he allots stalls is the quality and the nature of the horses necessary for his racing program?

A Yes, sir.

Q Would you say that generally the Racing Secretary, in New York in particular, and everywhere in general, has a pretty fair idea of the horses available on his grounds to make up the various racing cards?

A Yes, sir.

Q What is a condition race?

A A condition race is a race specifically written for a type of horse which would exclude horses that do not meet the conditions specified in the race.

Q By writing the particular condition, the Racing Secretary has the power to include or exclude a given horse from a particular contest; is that correct?

A Yes, sir.

Q Does the Racing Secretary, by and large, when he writes the conditions of a race and when he knows the horses available on his grounds, when he writes condition races does he have a pretty fair idea of which horses he is going to match against which horses in a particular race?

A I would say that would be the way to do it.

Q In so doing, he in effect determines the

1 wctb Hyland - direct 20

2 competition that each horse has to face in that race, isn't
3 that so?

4 A Indirectly, yes.

5 Q Would you elaborate a little bit on the functions
6 of the stewards, please, Mr. Hyland? One is appointed, you
7 said, by the Jockey Club, one by the New York Racing
8 Association, and one by the stable.

9 At a race track meeting with respect to the conduct of
10 the meeting and judgments made, is there anyone superior to
11 a steward?

12 A Not directly.

13 THE COURT: What do you mean by that?

14 THE WITNESS: Anyone against whom a ruling is made
15 has a right to appeal to the State Racing and Wagering Board.

16 Q I said at the track, barring right of appeal, the
17 stewards are the last word; is that correct?

18 A Yes.

19 Q When were you first appointed a steward by the
20 New York Racing Association?

21 A September 1970.

22 Q How long after that were you changed to the Jockey
23 Club steward?

24 A Can I make an approximation?

25 Q Approximately.

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Hyland - direct

21

1
2 A May 1972.

3 Q At that time the steward appointed by the Jockey
4 Club resigned, is that correct, to take a post with the Jockey
5 Club?

6 A Yes, sir.

7 Q That was Calvin Rainy?

8 A Correct.

9 Q He became Secretary of the Jockey Club upon the
10 death of a Mr. Kennedy, is that correct?

11 A That's right.

12 Q So that left the Jockey Club stewardship open?

13 A Yes, sir.

14 Q You were moved from the NYRA steward to become
15 Jockey Club steward, is that correct?

16 A I wasn't moved. I was asked if I wanted the job.

17 Q Yes.

18 THE COURT: Is there any difference in the two
19 jobs?

20 THE WITNESS: Yes, sir.

21 THE COURT: What is the difference?

22 THE WITNESS: Well, normally with being a steward
23 for the Jockey Club, you have an additional job of Assistant
24 Secretary, and the money is better.

25 THE COURT: But as far as your function as steward

1 wctb Hyland - direct 22

2 is concerned --

3 THE WITNESS: They are all the same, yes, sir.

4 Q So you now became the Jockey Club steward, and did
5 the NYRA appoint another steward?

6 A Yes, sir.

7 Q Who is that?

8 A Patrick O'Brien.

9 Q Do you know Mr. O'Brien?

10 A Yes, sir.

11 Q Did he want to become a steward?

12 A I have no idea.

13 Q But he was appointed nevertheless the NYRA steward
14 in your place?

15 A Yes.

16 THE COURT: The Thirteenth Amendment is not
17 involved here, is it?

18 MR. MOSS: I beg your pardon, sir?

19 THE COURT: I say the Thirteenth Amendment is not
20 involved here?

21 MR. HYDE: Involuntary servitude.

22 MR. MOSS: I am glad we are not arguing a
23 constitutional case here.

24 Q Let me be more specific. Well, let me ask you
25 another question first.

wctb

Hyland - direct

23

You also have officiating at the track patrol judges,
is that correct?

A Yes, sir.

Q Will you please describe their function.

A During the running of a race there are four patrol
judges that are stationed at various parts of the track,
according to the distance of the race. They observe the
running of the race and observe any incident that occurs in
their particular territory. When they observe something that
is not regular, they will call directly to the stewards and
report the incident.

THE COURT: That is a foul?

THE WITNESS: Yes, sir.

Q A foul being possibly an interference foul or
something of that kind?

A Yes, sir. Or even a horse falling or a jockey
losing --

Q Whatever it is?

A Right.

Q Are claims of foul occasionally put in other than
through reports of the patrol judges?

A Yes, sir.

Q Do trainers and owners occasionally put in claims
of foul?

1 wctb

Hyland - direct

24

2 A On occasion.

3 Q And sometimes would you say those are the fouls,
4 same things reported by the patrol judges, and sometimes
5 different?

6 A Yes, sir.

7 Q So that a trainer or owner may put in a claim of
8 foul with the stewards here upon certain occasions where the
9 patrol judge did report the same interference and on other
10 occasions they might not coincide, the patrol judge either
11 would or would not have done it when the other did, is that
12 correct? That is a little complicated.

13 A May I mention the other two options?

14 Q Yes.

15 A Where a jockey can claim foul against another
16 jockey, or the stewards can post an inquiry when they observe
17 something and it hasn't yet been reported.

18 Q But what I am trying to get at is that the
19 individual jockey, as you just mentioned, or trainer or
20 owner, may report an incident which the patrol judge may or
21 may not have reported, and vice versa?

22 A Yes, sir.

23 Q The placing judges call the order of finish, is
24 that correct?

25 THE COURT: Call the what?

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Hyland - direct

25

Q Order of finish.

THE COURT: Oh, you mean they announce who won the race?

Q First, second and third.

A They actually judge the first, second, third and fourth horses.

Q You also have a paddock judge, do you?

A Yes, sir.

Q What does he do?

A He checks the equipment on each horse, he makes sure the horses leave the paddock at the correct time, and he makes sure the horses are saddled at the same time and gets them in correct numerical order when they leave the paddock to go out on the track.

Q Do the stewards ever change the order of finish of a race?

A By disqualification.

Q In other words, if there has been an interference or a foul of any kind, they find that that is so, they can change the order of finish; is that correct?

A Yes, sir.

Q What does that involve, what does it mean when you say change the order of finish?

THE COURT: I take it they never overrule the

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observation --

THE WITNESS: Yes, sir, we do. In the running of a race we can overrule or decide against a claim of foul made by a jockey, an owner-trainer, or a patrol judge, if in our opinion it doesn't warrant a disqualification.

THE COURT: No. I mean what about the first, second and third? Do stewards ever say this came first, but it was actually second?

THE WITNESS: No, sir.

Q After the horses have come in, say, first, second or third, you can change that; is that correct?

A Yes.

Q Will you explain that, please.

A We rely on the placing judges who are assisted by a camera to judge the order of finish. Therefore, that is their duty and function. When it comes to the running of the race, it is our duty to observe any foul riding or incidents which would penalize another horse. If a foul claim is made or inquiry is posted, we look, in addition to interviewing the patrol judge in whose territory it happened and interviewing the riders on the horses involved, we are assisted by the film patrol, which is six movie cameras stationed permanently in various areas of the track.

So with the three assistants -- the word of the jockey,

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Hyland - direct

27

the report of the patrol judge, and viewing the films -- we base our decision.

If we find that one horse has bothered another horse, and he has finished in front of the horse that he bothers, we disqualify that horse from a certain section of the purse.

Q Sometimes you still leave them in the money but move them back to second or third and other times you move them out of the money entirely, is that correct?

A Yes, sir.

Q You place that horse wherever you think he ought to be placed judged by the gravity of the offense?

A Judged by the gravity of the offense and judged by against whom the offense is made.

Q Right.

A May I give an example?

THE COURT: Yes.

A For instance, if the horse finishes first, interferes with the horse that finishes second and doesn't bother any other horse, we might simply reverse the order of finish. If the horse that finishes first, or in the money for that matter, bothers another horse any time during the running of the race and that horse does not finish in the money, we conceivably can disqualify the horse that did the fouling and place him last.

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2 Q You have the right and you exercise the right to
3 do that with all horses which race at the NYRA tracks,
4 including those owned by trustees of the NYRA and including
5 those owned by Jockey Club members. Is that correct?

6 A Yes, sir.

7 Q Do the trustees of the New York Racing
8 Association race their own horses at their tracks?

9 A Some of them do.

10 Q Would you say that most of them do?

11 A I can give you the exact figure if you want me.

12 Q Let me do it this way, please. I am reading from
13 a list of trustees who were trustees at the time of the
14 commencement of this action. Did James C. Brady race horses?

15 A Yes, sir.

16 Q George D. Widener?

17 A Yes, sir.

18 Q John C. Clark?

19 A No, sir.

20 Q Jack Dreyfus?

21 A Yes, sir.

22 Q Walter Fletcher?

23 A Yes, sir.

24 Q John Galbreath?

25 A Yes.

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1
2 Q G. H. Bostwick?
3 A Yes, sir.
4 Q Christopher Chenery?
5 A Yes, sir.
6 Q Harry Guggenheim?
7 A Right.
8 Q John Hanes?
9 A Yes, sir.
10 Q Francis Kernan?
11 A Yes, sir.
12 Q Robert Kleberg?
13 A Yes, sir.
14 Q John A. Morris?
15 A Right.
16 Q Perry R. Pease?
17 A Right.
18 Q Ogden Phipps?
19 A Yes.
20 Q John M. Schiff?
21 A Yes.
22 Q Gerard S. Smith?
23 A I think so.
24 Q Alfred G. Vanderbilt?
25 A Yes.

1 wctb Hyland - direct 30

2 Q Joseph Walker, Jr.?

3 A I think he might have.

4 Q John H. Whitney?

5 A Yes.

6 Q So with the exception of one of them they all
7 raced horses?

8 A At that time, yes.

9 THE COURT: Incidentally, is the estate of Mr.
10 Fletcher a party to this action?

11 MR. HYDE: Your Honor, there has been no
12 substitution of the estate of Mr. Fletcher. We have given
13 notice upon the record of his decease but no substitution has
14 been made.

15 THE COURT: What is the technical effect of that?

16 MR. MOSS: The purpose of these questions is to
17 show --

18 THE COURT: No, I am just asking about Mr. Fletcher.
19 Mr. Fletcher happens to be dead.

20 MR. MOSS: That is right.

21 THE COURT: And his estate has not been substituted.

22 MR. MOSS: That is right. We have no claim against
23 him.

24 THE COURT: You have no claim against him?

25 MR. MOSS: That is right.

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MR. HYDE: In view of that statement, I move at this time, since we have not taken care of this formality, that the complaint be dismissed with respect to the defendants which have been deceased. I believe it has already been dismissed with respect to one such defendant, Mr. Widener. I now ask that it be moved that it be dismissed with respect to defendants James C. Brady, Walter D. Fletcher, Harry F. Guggenheim, Gerard S. Smith -- did I name James C. Brady?

THE COURT: Yes.

MR. HYDE: Yes.

MR. MOSS: No objection, your Honor.

THE COURT: Granted.

MR. HYDE: One more. Christopher C. Chenery.

THE COURT: Also deceased?

MR. HYDE: Also deceased.

THE COURT: No objection?

MR. MOSS: Not at all.

THE COURT: Granted.

MR. MOSS: I would say it is a high risk occupation, apparently.

Q I think you testified that those disqualifications -- oh, yes, you had the power to disqualify horses' qualifications, both Jockey Club members' and NYRA members' as well as

1 wctb Hyland - direct 32
2 nonmembers; is that correct?

3 A Yes.

4 Q These members of the board of trustees during the
5 period of which we are speaking did race horses --

6 A Yes.

7 Q -- under their own officials and at the NYRA tracks,
8 is that correct?

9 THE COURT: I did not get your question.

10 Q These officials, the trustees, did race horses at
11 the New York Racing Association tracks.

12 THE COURT: Yes. That is true?

13 THE WITNESS: Yes.

14 THE COURT: All right. That one trustee who did
15 not race horses --

16 MR. MOSS: There was one we said did not.

17 THE COURT: Out of curiosity, why would he want to
18 be a trustee?

19 THE WITNESS: I don't know, your Honor.

20 Q Have you been familiar more or less with the
21 workings of the New York Racing Association since its
22 formation?

23 A In what respect? I am primarily a racing official.

24 Q Let me ask you this: Do you know how the New York
25 Racing Association was formed?

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A Vaguely.

MR. MOSS: All right, we will leave that. As I said, I did not intend to start with this witness, if your Honor please.

Q Up to the time of the litigation between the Horsemen's Benevolent and Protective Association and the New York Racing Association and Jockey Club --

MR. HYDE: Which was --

Q Well, there were two pieces of litigation. There was a suit in the New York State courts with respect to their power to appoint officials. I think you testified to that suit?

A Yes.

Q And there is this present suit. Then let me speak of something else which was not a piece of litigation but a difficulty: a stoppage of racing at Aqueduct in 1969, I think it was. Is that correct?

A Yes.

Q Up to that time, up to 1969 -- let me put it that way -- was there ever a trustee of the New York Racing Association who had not been a member of the Jockey Club?

A I wouldn't know, honestly.

THE COURT: I imagine that is a historic fact or it is not.

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2 MR. MOSS: Yes, your Honor, and we will have
3 witnesses who testify to it.

4 THE COURT: Is it true?

5 MR. HYDE: I believe, your Honor, Mr. Dreyfus, who
6 was at one time Chairman of the New York Racing Association,
7 became such at a time when he was not a member of the Jockey
8 Club.

9 THE COURT: Had he ever been a member of the Jockey
10 Club?

11 MR. HYDE: No, not up to that point. He later
12 became a member of the Jockey Club after he became trustee
13 and Chairman of the New York Racing Association.

14 MR. MOSS: When was that, do you know?

15 MR. HYDE: We can find it.

16 MR. MOSS: I will stipulate to this effect, if it
17 is agreeable to Mr. Hyde -- we will supply the date: that
18 with the exception of Mr. Dreyfus, who was appointed a member
19 of the board of trustees in, I think it was, 1968 or
20 thereabouts, but I may be mistaken, and who later, within a
21 year, was also made a member of the Jockey Club, with that
22 one exception every member of the board of trustees was
23 appointed from the rolls of the Jockey Club.

24 THE COURT: Appointed at the time he was a member
25 of the Jockey Club?

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2 MR. MOSS: He was already a member of the Jockey
3 Club.

4 MR. HYDE: We are talking now of the period up to
5 1969.

6 MR. MOSS: That is right.

7 MR. HYDE: There are today a number of members,
8 trustee members, of the racing association who are not members
9 of the Jockey Club and who indeed do not race horses.

10 MR. MOSS: There has been a substantial difference
11 since 1969.

12 THE COURT: Apparently.

13 MR. MOSS: And we take part of the credit for that,
14 as a matter of fact.

15 But, in any event, our stipulation, then, is that
16 with the exception of Dreyfus, who became a member of the
17 board of trustees and a member of the Jockey Club subsequent
18 thereto during a given year, up to that time there was no
19 trustee of the New York Racing Association who had not been
20 previously a member of the Jockey Club.

21 THE COURT: This is prior to 1969?

22 MR. MOSS: Yes, sir.

23 MR. HYDE: I believe that to be correct, your
24 Honor.

25 THE COURT: Thank you.

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2 Q Is there one meeting a year held by the New York
3 Racing Association at Saratoga?

4 A Yes.

5 Q Is that a short meeting, incidentally?

6 A Four weeks.

7 Q Four weeks. 24 --

8 A Racing days.

9 Q 24 racing days.

10 A Yes.

11 Q At the Saratoga meeting is there a larger
12 percentage among the horse owners, a larger percentage of
13 Jockey Club and New York Racing Association trustee-owners?

14 MR. HYDE: Larger percentage of what?

15 THE COURT: Larger than what?

16 Q Than at Aqueduct and Belmont.

17 A Will you say that again, please?

18 Q At the Saratoga meeting is there percentage of
19 horse owners racing there larger -- wait a minute, I beg your
20 pardon -- of the horse owners racing there, is the percentage
21 of Jockey Club members and New York Racing Association
22 trustees larger in comparison to the total horse population
23 than at Aqueduct and Belmont?

24 A I think so.

25 THE COURT: You keep on talking about Jockey Club

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2 members and racing association trustees.

3 MR. MOSS: They are really identical.

4 THE COURT: Does the racing association have no
5 members, they are all trustees?

6 MR. MOSS: They are all trustees.

7 THE COURT: I see.

8 MR. MOSS: The Jockey Club, to avoid possible
9 subsequent confusion, board of directors call themselves
10 stewards, so we talk about a steward of the Jockey Club. We
11 do not mean the same thing as the kind of steward that Mr.
12 Hyland is.

13 THE COURT: Who elects the trustees of the racing
14 association?

15 MR. MOSS: They elect themselves.

16 THE COURT: From what?

17 MR. MOSS: Customarily from the rolls of the Jockey
18 Club up to this point.

19 MR. HYDE: I disagree with that statement. I
20 think the record will show that there are a number of
21 trustees at present who are not members of the Jockey Club.

22 MR. MOSS: At present. Yes, I said up to this
23 point.

24 THE COURT: But what is the legal mechanism by
25 which they are elected?

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2 MR. MOSS: The trustees --

3 MR. HYDE: Your Honor --

4 MR. MOSS: Sorry.

5 MR. HYDE: If I may, the New York Racing Association
6 is a nonprofit racing association which is organized pursuant
7 to a provision of the New York Racing Law, McKinney's
8 Unconsolidated Laws of New York, Chapter 7902. The trustees
9 of the racing association elect a successor in the event a
10 vacancy arises by death or resignation of an existing
11 trustee.

12 THE COURT: How did the first set get designated?

13 MR. MOSS: Like any other corporation, a group of
14 men got together and formed a corporation, and the original
15 body was self-composed.

16 THE COURT: And the legislature sanctioned that
17 group?

18 MR. MOSS: Well, not specifically that group. The
19 legislature passed a law which provides for the incorporation
20 of nonprofit racing associations. That is Section 7902 of
21 the New York Unconsolidated Laws, and it makes provision for
22 this type of association.

23 THE COURT: Maybe it would further my education if
24 I read that section.

25 Is the plaintiff Horsemen's Benevolent and

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Prote tive Association organized under this law?

MR. MOSS: No, they are organized in the State of Rhode Island and they act nationally under this provision.

THE COURT: They do not come under this section?

MR. MOSS: No.

MR. HYDE: Your Honor, they are a trade association. They do not operate any race tracks or hold any race meetings, unlike the New York Racing Association.

THE COURT: Are there any other organizations incorporated under this section in New York?

MR. MOSS: None.

MR. HYDE: That is correct, your Honor. There is one association incorporated under a comparable provision with respect to profit-making racing associations and that is the Finger Lakes Racing Association up in Canandaigua, New York.

MR. MOSS: And that is a totally different section construction. They have a year-to-year license instead of a 25-year franchise. It is totally different.

THE COURT: Under what section is the Jockey Club run?

MR. HYDE: The Jockey Club, again, your Honor, is simply a membership corporation, which does not hold race meetings as do New York Racing Association and Finger Lakes

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2 Association.

3 MR. MOSS: Your Honor, I would like to add just
4 this: that I do not intend by silence to give assent to what
5 Mr. Hyde just said about the genesis of this thing, because I
6 propose to prove that the genesis of the New York Racing
7 Association was in the Jockey Club; that the Jockey Club was
8 told by one of the racing commissioners the state of racing
9 in New York was in pretty bad condition, with the tracks
10 becoming antiquated and not doing well, and as a result of
11 his suggestion the Jockey Club formed a committee to revise
12 racing in New York, and there was a Jockey Club committee
13 which submitted to the legislature something known as a
14 Jockey Club plan; that the Jockey Club committee by itself
15 originated this system and this NYRA, which for a short time
16 went by a slightly different name, and that the original
17 trustees were put in there by the Jockey Club and made
18 application, and that this was a Jockey Club creature entirely
19 in its inception. That is what we propose to prove.

20 THE COURT: Incidentally, is it material to
21 anything in this action that George Monaghan used to be a
22 client of mine?

23 MR. MOSS: No, George Monaghan was Trotting
24 Commissioner. He had nothing to do with the running of races.

25 THE COURT: That shows how much I know about racing

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2 in New York.

3 MR. HYDE: Your Honor, I would at this time attempt
4 to respond to Mr. Moss' statement. I think this should come
5 out through the testimony.

6 MR. MOSS: Yes, it will.

7 THE COURT: That is what he intends.

8 MR. MOSS: I just did not want to give this any of
9 the earmarks of a stipulation of an agreed statement of facts.

10 BY MR. MOSS:

11 Q At most race tracks in the country, Mr. Hyland,
12 if you know, do the purses paid out to horsemen bear some
13 relationship to the handle?

14 A In most tracks throughout the country.

15 THE COURT: The what?

16 MR. MOSS: The handle.

17 THE COURT: The handle, all right. I understand
18 handle. I thought you said candle.

19 A Could you tell me that again, please?

20 Q In most race tracks through the country does the
21 purse payment percentage usually bear some relationship to the
22 handle, the pari-mutuel handle?

23 A I think so.

24 Q A certain portion of the handle goes to the state,
25 is that correct?

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2 A Yes, sir.

3 Q A certain portion goes to the track?

4 A Yes, sir.

5 Q Out of the track's portion of the handle the track
6 pays purses? Is that the way it works?

7 A Normally, yes.

8 Q At the Saratoga meeting does the New York Racing
9 Association pay a substantially greater percentage of the
10 handle out as purses than they do at Aqueduct and Belmont?11 A Well, the purses are allocated over a year
12 percentagewise.

13 Q You mean among Belmont, Aqueduct and Saratoga?

14 A Yes.

15 Q Each track has its own accounting for what it does
16 at each meeting, is that correct?

17 A I assume so.

18 Q With respect to the purse payouts at each meeting
19 at Belmont, Aqueduct and Saratoga, is it not a fact that the
20 purse payout at Saratoga percentagewise to the handle taken
21 is about twice as much or more as that paid out at Belmont
22 and Aqueduct?

23 A It is substantially higher, yes.

24 Q As a matter of fact, in one year they actually
25 paid out 107 percent of the handle, did they not? They

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2 actually paid out more in purses than the entire handle was,
3 did they not?

4 A I am not aware of that.

5 Q I read from Plaintiffs' Exhibit 8, the New York
6 State Racing Commission report for 1967:

7 "Significant is Saratoga's payout in purses in 1967.
8 Saratoga received as its share of the wagering 6 percent.
9 It paid out in purses 6.46 percent of the wagering."

10 That means that they paid out more than 100 percent,
11 does it not?

12 THE COURT: Don't ask the witness to compute.

13 MR. MOSS: I am sorry.

14 Q Where did that money come from, Mr. Hyland?

15 MR. HYDE: Which money?

16 Q The money paid out to Saratoga.

17 A Well, what particular year? Are you talking about
18 this particular year?

19 Q Let me put it in a different way. The extra high
20 purses were paid at Saratoga because the money was taken from
21 Belmont and Aqueduct, who received less than the statutory
22 amount of purses, to give higher than the statutory amount at
23 Saratoga -- well, let me end the question there.

24 MR. HYDE: I object to the question, your Honor.

25 THE COURT: This sounded like summation.

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2 MR. HYDE: It is argumentative, and also it assumes
3 facts not in evidence. The question speaks of higher purses
4 at Saratoga, and there is no evidence that the purses are any
5 higher at Saratoga than they are at Belmont and Aqueduct.
6 The fact is that they are the same purses at all three tracks.
7 We are one organization.

8 MR. MOSS: If your Honor please, the question is
9 going to come up again, so perhaps we can spend a minute on
10 it now. The figures have changed from year to year, but the
11 law, for example, at present says that 3 percent of the
12 handle shall be paid out as purses.

13 MR. HYDE: This is Section 7960-2c of the New
14 York Unconsolidated Laws, your Honor.

15 THE COURT: Can I see that?

16 MR. HYDE: Yes (handing).

17 THE COURT: As I read this section, there is no
18 limit on the amount of purse there can be; there is just a
19 floor.

20 MR. MOSS: No, that is the limit. They cannot pay
21 more than 3 percent. As a matter of fact, it is both a floor
22 and a ceiling.

23 THE COURT: It says: "for the years 1971 through
24 1975 an amount equal to 3 per centum of the total pools shall
25 be used exclusively for purses."

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MR. MOSS: Your Honor is right.

THE COURT: For purses. I don't see that that limits them to 3 percent.

MR. MOSS: What I am trying to say is that the plaintiffs' position is this: The 3 percent minimum is in now, and it used to be 2.76 or some such thing, and prior to that there was no direction at all from the state as to what they might pay out in purses. That is not the relevant thing.

Our position is this: They say this is one umbrella, we run three tracks, and as long as we pay out, say, 3 percent overall, nobody has any right to complain. We say that is not true. At Belmont and Saratoga, which generate the large amounts of money, the large amounts of handle -- Belmont and Aqueduct, I mean, of course -- at Belmont and Aqueduct, which we like to think the smaller horsemen race at mostly, the New York City tracks, they generate an enormous handle, they generate most of the money.

It is all very well to talk about how so long as we pay out 3 percent or whatever the percentage is overall. But what they do in practice is this: They have this party at Saratoga, which is attended by a vast number of Jockey Club members with their horses, and the percentage of these people racing at Saratoga, and as we shall show later the purses at Saratoga are much higher than the handle anywhere else, the

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2 handle at Saratoga cannot support those purses, there isn't
3 enough money, it is not possible. So what happens at the end
4 of the year is that you find that Belmont and Aqueduct get
5 less than 3 percent, substantially less, because that less
6 goes up to Saratoga to make it substantially more than
7 3 percent.

8 THE COURT: That is your argument, but this witness
9 obviously cannot provide the facts.

10 MR. MOSS: As I said before, I have other witnesses
11 who will testify to that.

12 THE COURT: I assume accountants will produce this
13 evidence.

14 MR. MOSS: Yes.

15 MR. HYDE: Your Honor, if I may have just a minute,
16 if we are going to have summation as we go along --

17 THE COURT: Let us not call it summation; let us
18 call it education.

19 MR. HYDE: It is like an opening statement, your
20 Honor.

21 THE COURT: Right.

22 MR. HYDE: But on the subject of Saratoga, the
23 New York Racing Association is required by law to hold 24 days
24 of racing each year at Saratoga -- I refer now to Section 7972
25 of the Unconsolidated Laws. The racing association, as Mr.

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2 Moss has indicated, considers itself to be a single entity,
3 which in fact it is. It owns three tracks, it conducts racing
4 at each of those three tracks.

5 THE COURT: It owns three tracks?

6 MR. HYDE: It owns these tracks, lock, stock and
7 barrel, your Honor. It is a private entity vested with full
8 title to these three properties. It is licensed or franchised
9 by the State of New York to conduct thoroughbred racing and
10 pari-mutuel betting at those three locations, and it is
11 required by law as a condition of its charter to hold racing
12 for so many days at the various locations.

13 Specifically, in the case of Saratoga, the New York
14 Racing Association must put on 24 days of racing, which
15 traditionally is held in the month of August. Saratoga is
16 the oldest thoroughbred racing plant in the entire United
17 States. Racing has gone on there continuously for well over
18 a hundred years. A noted sportswriter at The New York Times,
19 one Steve Cady, wrote just the other day that: "Saratoga
20 comes as close as any track in the nation to presenting racing
21 the way it should be presented."

22 I think that any real horseman would agree with that
23 statement, your Honor.

24 THE COURT: I can see your argument is going to be
25 that they have to give these higher purses in order to fulfill

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2 the provisions of 7972.

3 MR. HYDE: Yes, your Honor. Not only that, but for
4 the good of the sport, for the best interests of racing, they
5 put on a program at Saratoga which is comparable to the
6 program which is put on at Belmont and Aqueduct and the only
7 way you can put on a program which is comparable is by paying
8 out the same amount of purse money as you would pay out at the
9 other tracks, otherwise you would not attract the best horses
10 to Saratoga. It would run as a third-class operation if it
11 did not pay out purses comparable to Aqueduct and Belmont.

12 THE COURT: His argument is that they are paying it
13 out because it is their own members who are racing there.

14 MR. MOSS: That is exactly right.

15 THE COURT: I suppose that is what we have judges
16 for: to decide that.

17 MR. HYDE: Of course, when all is said and done,
18 your Honor, I don't know what the relevance of any of this is
19 to the federal antitrust laws.

20 THE COURT: I will find that out.

21 MR. MOSS: If they are using their power to adjust
22 these purses and they are using it to make it flow into their
23 own pocket in a track where they are in predominance, not only
24 the other tracks, I think it not only has relevance, I think
25 that is the heart of an antitrust case.

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BY MR. MOSS:

Q What is a stakes horse?

A A stakes horse is a horse of higher caliber that usually runs in the feature races throughout the country.

THE COURT: Is that the Triple Crown kind of thing?

THE WITNESS: Exactly.

Q And the stakes races are races for those stakes horses, is that correct?

A Stakes races are races where anyone can enter, provided they put up a nominating fee and nominate a horse.

Q But stakes races are usually filled by horses of the caliber you just described, stakes horses; is that correct?

A That's correct.

THE COURT: Because they are the only ones who have a hope of winning?

THE WITNESS: Yes.

Q Do you generally at Aqueduct and Belmont have about two stakes races a week?

A Are you talking about then or now?

Q Then.

A I would say yes.

THE COURT: You mean then, before 1969?

THE WITNESS: Yes.

Q Up to 1969. And at Saratoga did you have stakes

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2 races just about every day?

3 A I would say five times a week, maybe more.

4 Q Five times a week out of six days. So you had two
5 and a half times as many stakes races at Saratoga percentage-
6 wise as you did at Belmont and Aqueduct; is that correct?

7 A Yes.

8 Q That benefited, of course, the owners. The purses
9 went to the owners of these stakes horses, of these horses
10 that entered the stakes races?

11 A It benefited the winner.

12 Q Yes, in the stakes races. In other words, a man
13 who had stake horses had the opportunity of entering two and a
14 half times as many stake races at Saratoga as he would at
15 Belmont or Aqueduct, proportionately?

16 A Yes, sir.

17 Q That also meant that a greater proportion of the
18 purses allotted overall went to stakes than it did to over-
19 nights, is that correct, at Saratoga?

20 THE COURT: What was the other word?

21 MR. MOSS: "Overnights." I will have that defined
22 in a minute, your Honor.

23 A Yes.

24 Q What are overnights?

25 A Overnight is a race where the entry is closed the

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day before the race. It is just an ordinary race. There is no entrance fee, and the race is run the following day.

Where a stakes race is an early closing period, normally two weeks before the race is to be run, and a nomination fee is required.

THE COURT: How much is the nomination fee?

THE WITNESS: It is usually a nominal figure, depending on the size of the stakes.

THE COURT: What is nominal in your view?

THE WITNESS: Well, a hundred thousand dollar stake might require a hundred dollar nomination fee.

Q You mentioned a hundred thousand dollar stake. Is that a reasonable figure for what stakes normally run for?

A Pardon me?

Q Is a hundred thousand dollars a reasonably normal stake purse?

A No, it is a big stake purse.

Q How many of those would there be, would you say?

A I have no idea. Every track has one, or more.

Q But stake purses run substantially higher than overnight purses, do they not?

A Some do.

Q Would you say that normally they do?

A Normally.

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2 Q Over your years of experience with the tracks,
3 both before and after the formation of the New York Racing
4 Association, are you able to state whether or not members of
5 the Jockey Club owned a larger percentage of stake horses
6 than nonmembers, ordinary horsemen?

7 A I couldn't honestly say. I would have to look it
8 up. You say a larger percentage?

9 Q Yes. More stake horses percentagewise are owned
10 by Jockey Club members than by ordinary horsemen?

11 MR. HYDE: Your Honor, I object to this term
12 "ordinary horsemen." I don't think there is any testimony --

13 MR. MOSS: Well, other horse owners.

14 THE COURT: I think representing the Jockey Club
15 you have no standing to object or you will get fired.

16 Q Other horsemen, Mr. Hyland.

17 MR. HYDE: I don't think they would consider
18 themselves anything other than --

19 THE COURT: Ordinary horsemen.

20 MR. HYDE: -- ordinary horsemen in the sense that
21 they want to win races and have the best horses. I think
22 that is true of all horsemen.

23 Q Do they have the best horses, Mr. Hyland?

24 A Some of them do.

25 THE COURT: I assume that is their objective in

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life, to have the best horses.

THE WITNESS: Yes, sir.

THE COURT: At least one of their objectives. I don't want to limit them too much.

Q Is it true over that ten years can you state, Mr. Hyland, whether most stake races have at least one or more entries by Jockey Club members?

A Yes.

Q They do.

THE COURT: The problem has not come up, but what is the requirement for membership in the Jockey Club?

MR. MOSS: I have no idea. It is a private club, really.

THE COURT: Can anyone get in, or do you have to be elected?

MR. MOSS: You have to be elected.

MR. HYDE: You have to be elected to membership, your Honor. I think there are approximately 65 or 70 members of the Jockey Club, and membership is by invitation.

THE COURT: It is a club, in other words?

MR. HYDE: It is a private club.

THE COURT: A private club.

Q Incidentally, the Jockey Club is given certain powers in connection with New York racing too, is it not?

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2 A Yes, sir.

3 Q It is in charge of registration of colors?

4 A Right.

5 THE COURT: Registration of colors?

6 THE WITNESS: Colors.

7 Q Racing colors?

8 THE COURT: Is this provided for by statute?

9 MR. MOSS: Yes.

10 Q It settles disputes as to colors if any?

11 A In New York, yes.

12 Q In New York. It has to approve of leases and

13 stable names, is that correct?

14 A Correct.

15 Q And for the approval of stable names it receives a
16 fee, does it not?

17 A Yes.

18 Q Of how much?

19 A A hundred dollars, I think.

20 Q Does that hundred dollars continue each and every
21 year, a separate hundred dollars each and every year as long
22 as that stable name is used?

23 A I honestly couldn't tell you. They have lifetime --
24 no, I am sorry, it's colors. Yes, it has to be renewed every
25 year, stable name.

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2 Q For a hundred dollars. And they too pass upon the
3 application and the leases and the stable names of their own
4 members, Jockey Club members as well as other horsemen?

5 A Right.

6 THE COURT: The reason they do this is the
7 legislature tells them they have to, is that right?

8 MR. MOSS: They were given this power by the
9 legislature, if your Honor please. As your Honor has heard,
10 there is a case sub judice at the moment --

11 THE COURT: What?

12 MR. MOSS: There is a case sub judice at the moment
13 in Supreme Court, New York County, as to the authority to
14 delegate that kind of power to these organizations. It has
15 been finished, the case has been finished, but not yet
16 decided.

17 THE COURT: But the effect of the legislation as
18 far as this case is concerned -- I assume if they were
19 exercising these powers without legislative authority we would
20 have an antitrust violation established by merely doing it.

21 MR. MOSS: Your Honor, at the risk of being
22 accused of making another summation, perhaps I should have
23 made an opening statement as to what the plaintiffs' position
24 was. I did not do it because at one point we had submitted
25 a memorandum on this.

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2 THE COURT: Yes.

3 MR. MOSS: But perhaps it would be useful right now
4 to spend a minute on that if your Honor wants a statement of
5 our position. It is this.

6 In this particular case we contend that the monopoly
7 power over racing in New York, who is to be permitted even to
8 come in here to race, who is to get stalls, who is going to
9 be allowed to race against, the choice of the opponents, the
10 handicapping, who is going to be admitted to Saratoga, who is
11 going to be admitted to Belmont, and so on -- that monopoly
12 power we believe is almost beyond dispute, it is almost a
13 conceded thing.

14 THE COURT: The legislature has provided for it.

15 MR. MOSS: We are not even quarreling with it as
16 an illegal monopoly power insofar as the New York Racing
17 Association and the Jockey Club are managing racing in the
18 State of New York.

19 But now we have another situation, and I may add at
20 this point that I believe there is going to be comparatively
21 little dispute on the facts. I think we are going to be
22 faced with a question of law basically in this case.

23 Now we find these men who are the trustees of the
24 New York Racing Association, and exercise these various powers
25 over who can race and all the rest of it in New York, acting

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2 in a different capacity. They are now horsemen, racing their
3 horses in New York, against all other horsemen.

4 THE COURT: But the New York legislature must have
5 known that would be the case.

6 MR. MOSS: The New York legislature was entirely
7 silent on that.

8 THE COURT: I know, but I have to assume --

9 MR. MOSS: I will put it this way, if your Honor
10 please: that even in the case of private tracks, not in New
11 York State but in other states, the track owner is very often
12 permitted to race his own horses on his own track.

13 I think, however, if there is a showing of monopoly,
14 which in other cases does not exist, and that that power to
15 control racing is used to further their own interests as
16 private horsemen racing against other horsemen here, if that
17 power which admittedly the New York Racing Association and
18 Jockey Club have, is now being used in a conspiracy with these
19 individuals as private horsemen to benefit their chances,
20 their opportunities, their purses, their winnings, their
21 everything else, at that point there has been a violation of
22 the antitrust laws.

23 THE COURT: I assume your opponent would agree with
24 you on that statement.

25 MR. HYDE: I am sorry, I missed your Honor's

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2 statement.

3 THE COURT: I say I assume you agree with that
4 statement.

5 MR. HYDE: No, I certainly must disagree, your
6 Honor.

7 THE COURT: If he proves that they abused their
8 power, would that not be a violation of the antitrust?

9 MR. HYDE: Well, taking up separate sections of the
10 Sherman Act, he has charged here violations of both Section 1
11 and Section 2. So far as the monopolization charge, which
12 Mr. Moss has just directed himself to, is concerned, you must
13 have two things, your Honor, under the cases as we read them:
14 There must be a showing that monopoly power exists. For that
15 you have to have a showing of a relevant market and that the
16 defendant has monopoly power within that market. We have
17 heard a lot of talk here about the State of New York, but the
18 antitrust law is not divided up into fifty components, making
19 each state a separate market for Sherman Act purposes. The
20 actual fact, your Honor, is that the New York Racing
21 Association is one of fifty or sixty racing associations
22 throughout the United States. There are more than thirty
23 states in which thoroughbred racing is authorized by law.
24 The New York Racing Association is just one track. It
25 competes for getting horses, for getting horsemen, with tracks

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all around the country. These stake horses are typically shipped off to Santa Anita for a stake race or down to Florida. At the same time, your Honor, even if you look at the Eastern Seaboard as a separate market, you would find that the New York Racing Association is only a small percentagewise component of that market.

Your Honor, I think, can take judicial notice, with tracks on its doorstep in New Jersey, the State of New Jersey has now authorized a new track to be built right across the Lincoln Tunnel, the Hudson-Hackensack Meadows.

So we say, first of all, we do not have monopoly power.

THE COURT: What you claim is the relevant market.

MR. HYDE: Secondly, your Honor, we say even if your Honor were to find that the State of New York is a relevant market and that we do have monopoly power within that market, there is no violation of the antitrust laws unless and until some abuse has been proven.

THE COURT: That is what I say.

MR. HYDE: And that abuse would require an affirmative showing of illegal acts in restraint of trade, predatory acts directed at competitors or the like.

THE COURT: That is what I said I assumed you agreed with. I had not focused on the relevant market.

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2 MR. MOSS: Any competitive practice against their
3 competitors in New York.

4 THE COURT: If I should find this is a relevant
5 market.

6 MR. HYDE: Right.

7 THE COURT: And if your clients used bad faith and
8 predatory --

9 MR. HYDE: Anticompetitive practices.

10 THE COURT: Anticompetitive practice, it would be
11 a violation.

12 MR. HYDE: Yes. If we get into a question of
13 reasonableness.

14 THE COURT: Yes.

15 MR. HYDE: Yes.

16 THE COURT: But the relevant market I had not
17 focused on, which you mentioned.

18 MR. HYDE: I might also add to my last remark,
19 your Honor, that while we certainly do plead the state action
20 defense, and you will hear much evidence in the course of the
21 trial with respect to powers that have been conferred on both
22 the Jockey Club and the racing association by state laws, we
23 nevertheless say that even absent that state authorization we
24 would be acting entirely within our rights as a private
25 organization. We certainly do not agree with Mr. Moss'

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assertion : that the mere fact that members of the racing association race horses against nonmembers at a track gives rise in and of itself to a violation of the antitrust laws.

I think perhaps the case that comes closest in point here is the case involving the PGA, the Professional Golfers Association, decided a few years ago out in the Ninth Circuit. There you have the Golfers Association with members which put on, sponsored, virtually all of the major golfing tournaments for professional golfers of the United States. There members of the PGA compete against nonmembers in a tournament which is sponsored by the PGA, where distinctions are made between the eligibility of members and nonmembers, where the PGA appoints the officials who judge the conduct of the golfers and so on. We claim that that is entirely in point, your Honor, and the other court specifically found that this practice gave rise to no violation of the antitrust laws, absent any finding of predatory anticompetitive practices.

MR. MOSS: I accept that gladly, that there is no real distinction between the fact that these people have powers and they claim they have the same powers as a private organization. Because our position here is very simple: that as competitors these people, who also have the power to control this, have an absolute power to control their

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2 competition, to exclude them entirely, to let them participate
3 part of the time and not part of the time. There will be
4 cases submitted to your Honor that that control over the
5 competition, in itself, could be and probably is a violation,
6 if we couple that with damage.

7 THE COURT: I should not think it would be a
8 violation if it was imposed by state law.

9 MR. MOSS: The state law did not want these people
10 to control their competition. They wanted these people to
11 manage the state racing tracks. If they then race their
12 horses and give themselves competitive advantages and stifle
13 competition --

14 THE COURT: The legislature must have known that
15 these people were --

16 MR. MOSS: But not abuse.

17 THE COURT: Of course if it abused --

18 MR. MOSS: As your Honor said before, if they use
19 it to their own advantage --

20 THE COURT: If they abuse it and you prove it, and
21 if the market is relevant, that is something else.

22 Let us proceed.

23 BY MR. MOSS:

24 Q Are there a great many 2-year-old races at
25 Saratoga --

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1
2 A Yes.

3 Q -- compared to the other?

4 A There are a great many 2-year-old races at
5 Saratoga.

6 Q Is there any reason for that?

7 A We have 2-year-old races all over in New York. We
8 have 2-year-old races at every track in New York. And
9 Saratoga is the time of the year where the 2-year-olds are
10 starting to mature and becoming close to 3-year-olds.
11 Actually, they are over 2 years old at that time, they are
12 two and a half years old, some of them, and we do have a lot
13 of 2-year-old races there.

14 Q Is there a particular kind of owner who is more
15 likely to race a 2-year-old than another kind?

16 A Not necessarily.

17 Q Well, unnecessarily.

18 A Many owners have 2-year-olds; many owners do not
19 have 2-year-olds.

20 Q Did you once state, Mr. Hyland, that the more
21 affluent owner was likely to breed and race 2-year-olds to
22 race?

23 A Yes, I did.

24 Q Is that correct?

25 A Yes, sir.

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2 THE COURT: Is it a more expensive proposition to
3 race a 2-year-old?

4 THE WITNESS: Well, I mentioned, I think, that I
5 said that many of the people bred their own 2-year-olds that
6 had farms, bred their own 2-year-olds and then raced them.

7 Q And you described those as the affluent owners,
8 is that right?

9 A I said some affluent owners.

10 Q Tracks other than New York normally place a
11 restriction on the number of 2-year-old races, do they not?

12 A Some do.

13 Q Do they in New Jersey, for example?

14 A I don't know.

15 Q Do you know why they do that?

16 A I don't know if they do.

17 THE COURT: If they do, what would be a reason for
18 it, putting the restriction on 2-year-olds?

19 THE WITNESS: That would depend on the time of the
20 year. If it is a spring meeting, the 2-year-olds would not be
21 ready to run, they would be under-developed. If it was the
22 fall meeting, I don't see any reason why there would be
23 restrictions.

24 MR. MOSS: Would your Honor bear with me for just
25 a minute.

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Q Do you remember testifying in a case in the Supreme Court recently, HBPA v. NYRA?

A Yes.

Q Do you remember the Court asking you this question and making this answer?

MR. HYDE: What page?

MR. MOSS: 133 of the record.

Q Let me go back a couple of pages. Let me go back to page 132, at the bottom of the page.

"Question: And historically what has been the attitude of the operators of the Saratoga Race Track, which is now of course NYRA, with respect to providing stable space for 2-year-old horses?

"Answer: To my knowledge there never has been any limitation as to 2-year-olds."

Is that correct?

A Yes.

Q "Question: Do they accept them willingly and gladly?

"Answer: Yes."

Do you recall that? Is that correct?

A Yes.

THE COURT: Do you remember answering those questions?

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THE WITNESS: Yes.

Q Is that correct?

A Yes.

Q The Court asked you this question:

"Question: Is there any limitation in Belmont or Aqueduct?

"Answer: No, sir, but I might qualify that by saying other tracks in other states will put a limit on the number of 2-year-olds that can be brought in."

A Yes.

Q Is that correct?

A I thought your question said did they have any limit on 2-year-old races, not horses.

Q Horses, the number of 2-year-old horses, yes.

THE COURT: For my curiosity, who is the Court?

MR. MOSS: It was Judge Stecher, Mr. Justice Stecher.

THE COURT: What is the reason for the limitation of 2-year-old horses?

THE WITNESS: I think I said that. At some times of the year, for instance in the early spring, 2-year-olds are not developed. They might have a limited number of stalls at a particular meeting. They might have just a few 2-year-old races. In fact, I think it is at Santa Anita, when you run a 2-year-old maiden race and the horse wins the race, he

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2 has to get off the track. So there are certain limitations
3 in other places.

4 Q At Belmont and Aqueduct you say it is not such a
5 good season for 2-year-olds, is that correct?

6 A Pardon me again?

7 Q Belmont and Aqueduct are not open at the best times
8 for 2-year-olds?

9 A Aqueduct in the spring, it is a little early for
10 2-year-olds. As they progress, Belmont in a sequence of when
11 it runs is more favorable for 2-year-olds.

12 Q But you testified, did you not, as you just
13 reaffirmed, that there is no limitation at Belmont or
14 Aqueduct either, not only at Saratoga; is that correct?

15 A If I said so, yes.

16 THE COURT: Is it true as far as you know?

17 THE WITNESS: As far as I know. Again, could I
18 qualify that?

19 Q Yes. Is there any connection --

20 THE COURT: Wait, he wants to qualify it.

21 MR. MOSS: I am sorry, my back was turned.

22 THE COURT: He wants to qualify the answer.

23 A A lot of stables will not bring in 2-year-olds in
24 the spring of the year. They will leave them down on the
25 farm in South Carolina or Kentucky or Florida and wait until

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2 later in the year before they will bring them in.

3 THE COURT: But that is not the track's rules that
4 require that.

5 THE WITNESS: No, sir.

6 THE COURT: It is just their judgment.

7 THE WITNESS: Yes.

8 THE COURT: The owner of the horse.

9 THE WITNESS: Yes, sir, the trainer.

10 Q Are a substantial number of 2-year-olds owned and
11 raced by owners who were members and trustees of the New York
12 Jockey Club and New York Racing Association?

13 A Yes.

14 Q When they bring the 2-year-olds in in the early
15 spring, and so on, do many of those 2-year-olds actually
16 race?

17 A What do you mean by early spring, Mr. Moss?

18 Q Well, you said in the early spring wasn't a
19 good time for 2-year-olds. I take your meaning of early
20 spring, whatever you want to give it.

21 MR. HYDE: Your Honor, there was a "they" in
22 Mr. Moss' question. I am not sure who the "they" is
23 referring to. Owners of 2-year-olds generally or --

24 MR. MOSS: No, no, I said the Jockey Club members
25 and trustees.

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2 THE COURT: I don't get the question. Do they
3 race before they should? Is that what you are driving at?

4 Q Are a substantial number of 2-year-olds owned by
5 Jockey Club members and trustees?

6 A Yes.

7 Q They are allowed in without restriction at all to
8 the three NYRA tracks -- Belmont, Aqueduct, and Saratoga; is
9 that correct?

10 A Yes.

11 Q Are there many 2-year-old races at Aqueduct and
12 Belmont?

13 A More at Belmont than at Aqueduct.

14 Q And more at Saratoga than at Belmont?

15 A Right.

16 Q Do you know whether the practice of allowing in
17 2-year-olds without restriction, as compared with contrary
18 practices of other tracks, is related to the fact that so many
19 of these 2-year-olds are owned by Jockey Club members and
20 trustees of the New York Racing Association?

21 MR. HYDE: I object to the question, your Honor.
22 I don't think there is any evidence that --

23 MR. MOSS: I am asking for the evidence.

24 MR. HYDE: It is the way the question is phrased.
25 The fact that it seeks to establish, as phrased --

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2 THE COURT: It seems to me he says there were
3 restrictions in other states and there are no restrictions
4 here, so does the fact that they are Jockey Club owners have
5 any bearing on that question?

6 THE WITNESS: No, sir. All owners or trainers have
7 the option of bringing in 2-year-olds if they want to or not.
8 I mean, in their best judgment most of them leave them out
9 until later in the spring.

10 Q Does Mr. Vanderbilt customarily bring in a lot of
11 2-year-olds fairly early?

12 A I don't know.

13 Q Hasn't that been his practice?

14 A I don't know.

15 MR. MOSS: I have no other questions.

16 THE COURT: No further questions?

17 CROSS-EXAMINATION

18 BY MR. HYDE:

19 Q Mr. Hyland, you testified that you are the
20 Assistant Secretary of the Jockey Club?

21 A Yes.

22 Q Could you tell us what functions the Jockey Club
23 performs with respect to the sport of thoroughbred racing?

24 A Their basic function is to register foals. The
25 Jockey Club accepts application for foal registration. They

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maintain a stud book. No horse can run on the American turf unless it is a registered thoroughbred. The Jockey Club checks the pedigree of each horse before it issues the registration certificate for that horse. That is the primary function.

Q Continuing with that, for a minute, does the Jockey Club annually publish a book known as the American stud book?

A They have published supplements. The book itself comes out about every four years

THE COURT: Does this cover the whole United States?

THE WITNESS: Yes, sir.

THE COURT: They cannot run from Louisiana or Florida unless you are in this book?

THE WITNESS: Yes, sir. Canada also.

Q Is that provided for in the rules and regulations promulgated by the various state racing commissions throughout the United States?

A Yes, sir.

Q And Canadian provinces?

A Yes, sir.

MR. HYDE: I don't want to put a volume of this magnitude in evidence, your Honor, but I would like to identify the most recent version or supplement of the American stud book.

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2 Q Is that it?

3 A This is the book itself.

4 MR. HYDE: Your Honor, this is a two-volume set
5 (handing to the Court).

6 THE COURT: This came out in 1973, so there has not
7 been one since?

8 THE WITNESS: No, sir. They do have an annual
9 supplement of foals born after the book comes out.

10 THE COURT: And it is just a list of horses?

11 THE WITNESS: It lists the brood mares and their
12 progeny and the sire of each.

13 Q In addition, Mr. Hyland, does the Jockey Club
14 publish a book showing the names of thoroughbred horses which
15 are not available for use at a given time?

16 A Yes. These are names that are currently in use.

17 THE COURT: The stud book?

18 THE WITNESS: No, sir, there is a separate --
19 Mr. Hyde was saying they put out a separate book that lists
20 the names of horses that are currently being used.

21 Q In addition to the ones that are currently being
22 used, does that cover horses which have been deceased within
23 a given period of time?

24 A Yes.

25 Q (Is it fair to say that that book has a list of

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horses that looks roughly like the length of the Manhattan telephone book?

A Well, it is quite voluminous.

THE COURT: That book would have horses in it which are not in the stud book?

THE WITNESS: No, sir. They would be in the stud book. This is a separate -- I think Mr. Hyde is talking about naming horses?

MR. HYDE: Yes.

THE WITNESS: Owners can name their own horses, they give each horse a name. The name is checked in the Jockey Club records. If some other horse has that name, we don't allow the name that is applied for, and they ask for another name. So to facilitate the naming of a horse, we do put out a book listing names that are currently in use.

BY MR. HYDE:

Q If the name is not in use or has not been retired for some reason, may any owner give his horse that name and register with the Jockey Club?

A Yes.

Q I talked about being retired. When are names of horses retired?

A Well, any outstanding horse, really outstanding, Man O' War, Secretariat, eventually will be retired. We try

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2 not to have duplicates of the great horses.

3 Q But if it is not a great horse and it died ten years
4 ago, then that name could be used again?

5 A Well, it used to be fifteen years. I think it is
6 cut down now to ten.

7 THE COURT: But names like Man O'War are kind of
8 permanently taken out?

9 THE WITNESS: Yes, sir, they are historical and we
10 don't let them take those out.

11 MR. HYDE: It is like retiring Babe Ruth's number,
12 your Honor. They are taken out of circulation for good.

13 Q What other functions does the Jockey Club perform?

14 A We register colors of owners. Each owner has a
15 set of silks that he runs under. The colors are distinctive.
16 And rather than have two owners with the same silks, which
17 could be confusing and also lead to hard feeling, we act as
18 more or less of a clearinghouse to show which colors are
19 available and which are not.

20 THE COURT: This is for the whole United States
21 and Canada?

22 THE WITNESS: Not necessarily. The United States
23 and Canada apply only to the registration of horses. Whoever
24 wants to can have their colors checked and registered with the
25 Jockey Club. In some other states they do not require that

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the colors be registered with the Jockey Club.

Q But New York, however, does require such registration?

A Yes, sir.

Q And other states as well as New York?

A Many states do require it.

Q Could you tell us what function colors serve in the sport of racing.

A Well, I think it gives the owner something to root for, shall I say. He has his own colors.

Secondly, and probably the most important reason, you can distinguish each set of colors during the running of a race and it is an easy way of identifying a particular horse, by the colors that the jockey wears.

Q What other functions does a Jockey Club perform?

A We file leases, stable names, apprentice contracts, partnerships, we answer many, many thousands of letters a year, information letters.

Q Let me break that down. You say you register leases. What are they?

A For instance, a breeder might have a good horse or a fair horse, and he might not want to run the horse but he wants to save him for breeding or something like that. He might be primarily interested in breeding. So he will lease

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2 this horse to another person, giving the other person the
3 privilege to run the horse.

4 Q And the Jockey Club records will show who owns
5 the horse --

6 A Yes.

7 Q -- and who has him on lease?

8 A Yes.

9 Q Incidentally, are these public records which are
10 available?

11 A Yes, they are published.

12 Q They are published in a work --

13 A Thoroughbred Record Magazine.

14 Q Yes. In an annual supplement?

15 A Yes.

16 Q The Thoroughbred Record.

17 A Yes, sir.

18 Q You mentioned stable names. Could you tell us what
19 they are and what function they serve.

20 A Well, many people would rather not use their own
21 name as an owner. So they would register under an assumed
22 or stable name. In many cases partnerships cannot decide on
23 whose name the horse will run, so they will have an assumed
24 name and run under that name.

25 Q Is it necessary --

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THE COURT: Incidentally, Mr. Hyde, how long is your examination going to be?

MR. HYDE: I think I may be some time, your Honor.

THE COURT: Let us take a break. We will have a ten-minute recess.

(Recess.)

Q Mr. Hyland, I think we were discussing stable names. Does an owner have to have a stable name in order to race in New York?

A No, sir.

Q He can race under his individual name?

A Yes.

Q Do some of the members of the Jockey Club race under stable names?

A Yes.

Q Do others race under their individual names?

A Yes, sir.

Q Is that also true of trustees of the New York Racing Association?

A Yes.

Q I think you also testified that the Jockey Club registers partnerships. What are those?

A Well, many people don't want to own a horse individually. They figure if they have a partner they can

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2 buy more horses or they have a friend who wants to own a horse
3 with them. So they file a partnership with the Jockey Club.

4 Q Again this is required by law in the State of New
5 York in order to race under a partnership?

6 A Yes, sir.

7 Q I think you further testified that the Jockey Club
8 registers apprentice contracts.

9 A Contracts.

10 Q What are they?

11 A Any boy between the age of 16 and 25 that wants to
12 become a jockey, in order to become an apprentice has to have
13 someone to hold his contract; in other words, he has to have
14 an employer. The employer and the boy, if the boy is old
15 enough, or the father and mother of the boy, sign an agreement,
16 which is registered with the Jockey Club over a term of either
17 three years or five years.

18 THE COURT: I imagine in today's world you would
19 rephrase that answer: boy or girl.

20 THE WITNESS: Yes, sir.

21 Q Again this is required by the rules of the State
22 Racing Commission in New York?

23 A I believe so.

24 Q Mr. Hyland, historically did the Jockey Club adopt
25 and promulgate the rules of thoroughbred racing throughout

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the United States?

A Yes, they did.

THE COURT: The rules of what?

MR. HYDE: Thoroughbred racing.

Q What are the rules of racing?

A A series of, well, statements or a book which covers every conceivable thing that could possibly happen in the conduct of racing. It originated because at one time there were no rules under which people raced. And when, for instance, well, a foul came up, there was no way of judging who was the offender, who was the one that had the damage done to him. And to organize it and make it run smoothly, the Jockey Club started a book of rules called The Rules of Racing.

Q Do you know when that occurred, approximately?

A I think approximately 1897.

Q When was the Jockey Club formed, if you know, approximately?

A I think around that time.

Q Is it accurate to say that, as time went by, functions of the Jockey Club with respect to promulgation of rules of racing were taken over by the State Racing Commission in New York and other states?

A Yes.

2 Q And today the New York State Racing Commission
3 promulgates rules of racing?

4 A That is right.

5 Q Are those by and large based upon the original
6 Jockey Club rules of racing?

7 A That's true.

8 Q Turning now to the appointment of stewards, you
9 testified that you were a steward appointed by the Jockey
10 Club to officiate at New York Racing Association meetings,
11 is that correct?

12 A That's correct.

13 Q In addition, does the Jockey Club also appoint one
14 of the stewards to officiate at the Finger Lakes Racing
15 Association?

16 A Yes, it does.

17 Q Again historically, did the Jockey Club at one
18 time appoint all of the stewards that officiated at New York
19 tracks?

20 A I couldn't answer that accurately.

21 Q Today, in any event, the Jockey Club appoints one
22 steward, the New York State Racing Commission appoints one
23 steward, and the racing association appoints the other
24 steward.

25 A That's right.

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Q So that in the case of the New York Racing Association tracks, one steward is appointed by the NYRA and in the case of Finger Lakes one steward is appointed by the Finger Lakes Racing Association.

A Correct.

Q Do each of those stewards have to be approved prior to their appointment by the New York State Racing Commission?

A Yes. The State Racing and Wagering Board now.

THE COURT: What did you say?

THE WITNESS: I am sorry. The State Racing Commission I believe is now the State Racing and Wagering Board. They changed the title.

THE COURT: The State Racing and Wagering Board?

MR. HYDE: State Racing and Wagering Board. Your Honor, I believe it was approximately a year ago the functions of the various racing commissions were shifted. At that time there was a New York Racing Commission which covered thoroughbred racing; there was a separate commission with respect to harness racing. You had OTB entering the picture. You have provision, I believe, for quarter-horse racing, which has never been implemented. All of these functions were put under a single board known as the New York State Racing and Wagering Commission.

However, all of the original commissions continued

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in existence as advisers to the Racing and Wagering Board.

I think, to avoid confusion, both Mr. Moss and myself have been using the term racing commission, even though technically its functions are now vested in this racing and wagering board. With your Honor's permission, I think we will probably continue to use the phrase racing commission for the sake of simplicity.

Q I think you may have answered this question, Mr. Hyde: All of the stewards, including the one appointed by the Jockey Club and the one appointed by the racing commission, must be approved in advance by the State Racing Commission?

A Yes.

THE COURT: I take it there is no provision that that approval cannot be unreasonably withheld. I notice the members of the association have to be approved, the approval cannot be unreasonably withheld.

MR. HYDE: I don't believe that provision is in the act. I cannot locate it immediately.

THE COURT: Like Senate approval of the judge, that can be quite unreasonable.

MR. MOSS: In any event, it has never arisen, your Honor.

MR. HYDE: I think your Honor adverted to the next

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question I was going to ask this witness with respect to the trustees of the New York State Racing Association.

Q It is a fact that each trustee must be approved in advance by the State Racing Commission?

A Yes.

THE COURT: Did I correctly read that provision that that approval cannot be unreasonably withheld?

MR. HYDE: I believe that is correct, your Honor.

Q There was testimony on your direct examination with respect to a number of other racing officials. I believe the Racing Secretary and Handicapper, the patrol judges, placement judges, among others, were mentioned. Do each of these officials have to be approved prior to their appointment by the New York State Racing Commission?

A Yes.

THE COURT: I take it this is unrestricted power of disapproval also?

MR. HYDE: Yes. I believe that to be the case, your Honor. There was an absolute power, as I understand it, vested in the New York State Racing Commission to withhold this approval for whatever reasons it deems fit.

Q Staying for a minute with the functions of the stewards, I think you testified that the primary function of the stewards is to observe the running of the races and

2 to receive reports from persons who are involved in a possible
3 claim of foul and to render a judgment with respect to whether
4 or not a horse should be disqualified. Is that correct?

5 A Yes.

6 Q Mr. Hyland, have you garnered information with
7 respect to the number of horses that have been disqualified
8 by the stewards in the past few years?

9 A Yes, I have.

10 Q Could you tell us the total number of horses which
11 have been disqualified at New York Racing Association tracks,
12 starting with the year 1970.

13 A May I refer?

14 Q Yes.

15 MR. MOSS: Starting with what year, I beg your
16 pardon?

17 MR. HYDE: 1970.

18 THE COURT: What are you referring to?

19 THE WITNESS: I have some data here.

20 THE COURT: I suppose you ought to mark these for
21 identification as he is going to read it.

22 MR. HYDE: I have no objection.

23 You can mark this Defendants' Exhibit A for
24 identification.

25 (Defendants' Exhibit A was marked for

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2 identification.)

3 A In 1970 there were 76 disqualifications at the
4 NYRA tracks from first, second, third and fourth positions.

5 Q Incidentally, Mr. Hyland, first, second, third and
6 fourth positions are the positions which participate in the
7 purse distribution?

8 A That is correct. Of the 76 disqualifications from
9 all four positions, 12 of the horses disqualified were owned
10 by Jockey Club members and/or trustees.

11 MR. MOSS: I am terribly sorry, I did not hear
12 that.

13 A 12 horses disqualified were owned by Jockey Club
14 members and/or trustees.

15 In 1971 there were 61 disqualifications from first,
16 second, third and fourth positions. 16 horses disqualified
17 were owned by Jockey Club members and/or trustees.

18 In 1972 there were 62 disqualifications from first,
19 second, third and fourth positions. 14 of the horses
20 disqualified were owned by Jockey Club members and/or
21 trustees.

22 In 1973 there were 71 disqualifications from first
23 second, third and fourth positions. 12 of these horses were
24 disqualified that were owned by Jockey Club members and
25 trustees.

2 Q Mr. Hyland, in determining whether or not a horse
3 should be disqualified or in exercising your functions as
4 steward in any manner, have you ever been influenced in any
5 way by the fact that the owner of that horse is a member of
6 the Jockey Club or trustee of the New York Racing Association?

7 A No.

8 Q Have there been instances where you as a steward
9 have participated in the disqualification from large stake
10 purses?

11 A Yes.

12 Q Horses owned by trustees or Jockey Club members?

13 A Yes.

14 Q Can you give us one or two examples?

15 A Probably, Hoist The Flag was owned by a wife of a
16 Jockey Club member and we disqualified him from the Champagne,
17 and that was over a hundred thousand dollar added. We
18 disqualified Secretariat as a 2-year-old -- at that time I
19 believe he was owned by C. T. Chenery, and we disqualified
20 him from a large --

21 Q Mr. Chenery was a member of the Jockey Club?

22 A Yes.

23 Q As well as a trustee of the New York Racing
24 Association?

25 A Yes, sir.

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2 Q Mr. Hyland, in your direct testimony the question
3 with respect to the allocation of stalls, I would like to ask
4 you a couple of questions in that area.

5 First of all, does a horse have to be stabled on the
6 grounds of the racing association in order to be eligible to
7 run at a race there?

8 A Normally, yes. However, we do allow horses to ship
9 in from other race tracks. But they must be stabled at a
10 recognized race track before they can run in New York.

11 Q In other words, they cannot be stabled at some
12 private premises or farm and race at a race track, is that
13 correct?

14 A That is correct.

15 Q Is that a general rule throughout the United
16 States?

17 A No, sir. In some states they do permit horses to
18 run off of farms.

19 Q And that is not true in New York?

20 A No, sir.

21 Q Is that requirement based upon reasons of security
22 with respect to the conduct of the races?

23 A Partly security, partly on information. Many of
24 these horses that are stabled on farms work out there, and
25 the public has no way of knowing the workouts that these

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horses participate in. When they are stabled on our race tracks, we have clockers there that record the works of each horse, and these are published, and the public is aware that the horses have worked.

Q In addition, the security factor is a part of this?

A The security factor is a big thing.

Q In other words, it is easier to tamper with a horse which is not on the premises of the racing association than one which is, is that correct?

A That is true.

Q Are the stalls which are made available to these horses made available by the racing association free of charge?

A That is correct.

Q I think you testified to the number of stalls generally. Could you tell us how many stalls there are at each of the New York Racing Association tracks, approximately.

A Oh, approximately, I would say, less than 300 at Aqueduct for purposes of racing horses; approximately 1,800 at Belmont; and I would say 1,500 to 1,600 at Saratoga.

Q Do you know whether it is possible to increase the number of stalls at those tracks at this time?

A I don't know.

Q I think you testified that the owner or trainer

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must apply for stalls. Could you tell us how that works, Mr. Hyland.

A Normally stall applications are mailed in the wintertime long before our meeting opens, and they are sent to racing centers throughout the country. Trainers or owners will fill out an application for stall space. There is a deadline set, and the applications must be in the New York Racing Association hands by a certain date. The applications are then screened according to the number of horses, the quality of the horses --

Q Incidentally, what does the application contain by way of information?

A The application contains space for the names of the horses, their color, age, sex, name of the owner, I am giving it to you in general terms -- name of the owner and it lists the number of horses.

Q Also the name of the horse?

A Yes.

MR. HYDE: Could this be marked as Defendants' Exhibit B for identification.

(Defendants' Exhibit B was marked for identification.)

Q Mr. Hyland, I would like to show you Defendants' Exhibit B for identification and ask you if that is a specimen

1 wctb Hyland - cross 90
2 of the form of stall applications used at New York Racing
3 Association tracks.

4 A Yes, it is.

5 MR. HYDE: I would offer this in evidence.

6 MR. MOSS: No objection.

7 THE COURT: Received.

8 (Defendants' Exhibit B was received in evidence.)

9 Q Mr. Hyland, I believe I interrupted you. You were
10 about to describe what the Racing Secretary takes into
11 consideration in reviewing the stall applications.

12 A Well, normally I can only speak from my own
13 experience when I was in the office --

14 Q Right.

15 A -- the seniority of a trainer or owner is taken
16 into consideration in the allotment of stalls. By that I
17 mean, we try to take care of the people that have raced
18 with us previously. We also go over the quality of the
19 horses for whom application is made for stabling. As I said,
20 we have applications for over 5,000 horses, maybe more, and
21 we are limited as to the number of stalls we have. So we
22 assign the number of stalls to a trainer that he is allowed
23 to bring in for these particular stalls. The trainer, in
24 turn, if he has thirty horses and only is allotted twenty
25 stalls, makes the judgment of his own horses as to which

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ones he wants to bring in.

Q So that let us assume, as an example, that we have a trainer -- I think you testified that some trainers train for a number of owners, there may be four or five different owners having four, five, six horses each, which one trainer will train for; is that correct?

A That is correct.

Q So let us assume that we have a trainer who applies for thirty stalls, listing by name and owner the horses that he proposes to bring in, and let us further assume that the Racing Secretary only gives him, let us say, twenty stalls out of the thirty he applied for, who determines which horses of which owner will come to the track?

A The trainer. There is a case -- may I just?

Q Yes.

A For instance, if a horse might not be eligible to run in New York, the Racing Secretary will cross that horse's name off and leave the balance for the trainer to decide.

Q With that exception, it is up to the trainer to determine which of the horses will get stall space when he is allotted all of the stall space he has requested?

A Yes.

Q In addition to the factors you have testified to, is the character of the owner or trainer taken into

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2 consideration in any way?

3 A I would have to think so, yes.

4 THE COURT: What do you mean? What way would that
5 be?6 THE WITNESS: Well, a person that might not be
7 eligible to run at a particular track, there might be a ruling
8 against the particular trainer, and if he applied for stalls
9 in New York and was under suspension we would not allow him
10 to run in New York.11 Q With respect to the 2-year-olds, I think you
12 testified that the New York Racing Association has no
13 restriction on the number of 2-year-olds that may be brought
14 in. Is that correct?

15 A When I was there, yes.

16 Q Does it have any restriction on any type of horse
17 by category?18 A Only in value. We have a rule regarding the
19 eligibility of horses that are run for a certain claiming
20 price. Any horse that is started below this certain claiming
21 price is not eligible to run in New York unless he has run for
22 a larger claiming price.23 Q Perhaps you had better explain for the record what
24 is meant by claiming price.

25 THE COURT: What is a claiming price?

THE WITNESS: It is a particular type of race written by the Racing Secretary which limits prices set, and the horses are entered within these limits of price. Weight is allowed to be taken off if they enter for the lowest or corresponding lower price. The trainers actually grade their horses by putting them in these claiming races.

Now, any owner that has started a horse at the meeting and has the necessary funds on deposits with the horsemen's bookkeeper can fill out a claim slip and claim one of these horses from the race that belongs to another owner. It is like a sale, only it is not a sale per se.

THE COURT: You mean when when he has a claiming price, that means anybody can buy that horse at that price?

THE WITNESS: That is eligible to claim.

Q In other words, entering a horse in a claiming race is like putting him up for auction?

A Yes. Sale rather than auction.

Q Sale, yes. With respect to the matter of bringing 2-year-olds into the stalls, you testified that there is no restriction imposed upon number of 2-year-olds, is that correct?

A That is right.

Q It is entirely up to the owner or trainer in his own best judgment to determine whether or not a horse is

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2 ready to be brought in?

3 A Yes, generally.

4 Q But in addition to that would the fact that an
5 owner or trainer proposes to bring in 2-year-olds who may not
6 be ready to race be one of the factors that the Racing
7 Secretary would take into consideration in determining whether
8 or not to grant stall space to that trainer?

9 A I really don't understand your question, Mr. Hyde.

10 Q Perhaps I have not phrased it properly. You
11 testified that in going over the stall applications one of
12 the factors that the Racing Secretary considers is the nature
13 of the horses that the trainer has and proposes to bring in
14 and whether or not such horses will enhance the racing
15 program.

16 Would the fact that some of these horses are 2-year-olds
17 and not ready to race be one of the factors that would be
18 taken into consideration in determining whether or not stall
19 space should be granted or indeed how many stall spaces
20 should be granted?

21 A Can I answer that in a different kind of
22 direction?

23 Q Yes.

24 A Most trainers and owners that have 2-year-olds will
25 keep the horses off the grounds until the horses are developed.

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They will not bring in undeveloped 2-year-olds. Some of them will, but very few. It is a matter of discretion mostly on the part of the owner and trainer. The 2-year-old races are usually written starting with April at a much shorter distance. And the 2-year-olds come in around that time. Some of them no doubt are on the grounds in March.

THE COURT: The question is, if you have a shortage of stalls and you get an application from 2-year-olds that you do not think are ready to run, would you exclude those?

THE WITNESS: It could be done, yes, sir.

Q Mr. Hyland, if the total amount of purses paid at Saratoga were to be limited to 3 percent of the handle at Saratoga, what would happen to racing at Saratoga?

MR. MOSS: Just a minute, please. I think there must be a preliminary for this question. He is asking an opinion without giving any indication of the basis for an opinion or the qualifications given, your Honor.

THE COURT: I think you have qualified him.

MR. MOSS: I think a question like that I will object to as to form as altogether too general -- what would happen to racing.

THE COURT: We will see what the answer is.

Overruled.

A Well, Saratoga conceivably could deteriorate into

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a county fair type of meeting or a half-mile meeting if the purse structure was not comparable to the downstate tracks.

Q If that were to happen, Mr. Hyland, what do you think would then happen so far as subsequent September meetings at Belmont or Aqueduct are concerned?

A Well, in my opinion, if we raced at Saratoga using the smaller purse structure, many of our owners and trainers would go to New Jersey, which is racing at the time, and conceivably could stay there. And I think our whole fall program would eventually suffer from it.

THE COURT: In other words, there is a fall program at Belmont?

THE WITNESS: Yes, sir, and at Aqueduct.

THE COURT: And at Aqueduct. Does the fall program at Belmont and at Aqueduct have fewer 2-year-olds also?

THE WITNESS: No, sir.

THE COURT: That at Saratoga?

THE WITNESS: No, sir. They generally just keep right on going.

THE COURT: So your testimony earlier about the difference between Saratoga and Belmont-Aqueduct related only to the spring racing?

THE WITNESS: Yes. 2-year-old -- well, 2-year-olds start developing in the summertime, and they are reaching

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2 maturity from, say, August on. And when they come down in
3 the fall, there is a need for 2-year-olds, because from the
4 2-year-olds evolve the 3-year-olds. I mean, it is a long-
5 range program of one developing from the other.

6 MR. HYDE: I have no further questions.

7 REDIRECT EXAMINATION

8 BY MR. MOSS:

9 Q If there were a smaller purse structure at
10 Saratoga, the racing would deteriorate; is that correct?

11 A Yes.

12 Q And you think that during that period might race
13 at New Jersey tracks instead?

14 A I would have to think so.

15 THE COURT: What is your answer?

16 THE WITNESS: I said I would have to think so.

17 Q The highest purses and the best racing are in
18 New York, is that correct?

19 A That is correct.

20 Q And the biggest handles and the biggest crowds are
21 at Aqueduct and Belmont, is that correct?

22 A Yes.

23 Q Is there any reason for making you believe that
24 when Aqueduct and Belmont reopen in the fall the people would
25 not come in from New Jersey but would prefer to stay in New

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Jersey and race?

A Would you mind saying that again, please, Mr. Moss?

Q Is there any reason for thinking that when Aqueduct and Belmont reopened in the fall with these large purses and handles, for thinking that these people would prefer to remain in New Jersey to race rather than coming into New York?

A It is only an opinion. However, I do think that some of the people that normally would race in Jersey would stay there, because otherwise they would not get stall space for the month of August.

Q That would be true in any case, would it not?

A In many cases.

Q In Saratoga you have a great many outsiders racing, don't you?

A We have some.

Q You have a great many people coming in all over the country to race at Saratoga who don't normally race in New York at all, isn't that so?

A We have some.

Q A great number? Does that offend you when I say a great number?

A Yes.

THE COURT: I thought your position was that

Saratoga was the monopoly of the Jockey Club and --

MR. MOSS: The Jockey Club members from all over the country come in for that Saratoga meeting.

THE COURT: I see. Not necessarily members of the New York Racing Association.

MR. MOSS: I have begun to use the word Jockey Club, because during our period there was no member of the New York Racing Association who was not a member of the Jockey Club. So when I used Jockey Club, I automatically meant members of the New York Racing Association.

Q Do members of the Jockey Club come from all over the country to race?

A Most of the people who come in to Saratoga are not necessarily Jockey Club members.

Q Are some of them Jockey Club members from other parts of the country?

A I would have to say yes.

Q Are a great many of them relatives of Jockey Club members and trustees?

A I have no idea.

Q Are they members of stables which one or more of the partners is a Jockey Club member and trustee?

A I couldn't answer that either.

Q But in any event these people do come in and race

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2 exclusively at Saratoga, is that correct?

3 A We do have some stables that race exclusively at
4 Saratoga.

5 Q Yes.

6 THE COURT: Why is that?

7 THE WITNESS: Tradition in many cases; in many
8 cases Saratoga has 2-year-old stakes, and these people are
9 developing their 2-year-olds out of town, and they ship their
10 2-year-olds to race at Saratoga, which makes it good racing
11 up there.

12 Q You talk about tradition at Saratoga. What is
13 that tradition?

14 A Well, I don't understand what you mean by tradition.

15 Q Did you use the word tradition?

16 A I did.

17 Q Will you tell me what you meant by it.

18 A Tradition in my opinion is, for instance in the
19 case of Saratoga, it has been running since 1963. Many of
20 the same people go there year after year, race their horses.
21 Saratoga has been always noted for 2-year-old races because
22 it is the time of the year when the 2-year-olds are starting
23 to develop.

24 Q Right.

25 A Traditionally Saratoga has outrageous prices and

2 so forth.

3 Q Is there a large social season connected with the
4 racing season in Saratoga?

5 A Generally, yes.

6 Q And you read about what happens at Saratoga in the
7 society columns more than you do in the sports columns, don't
8 you?

9 A I don't.

10 Q Well, let me put it this way: You could if you
11 wanted to?

12 A Yes.

13 Q Do a great many of the Jockey Club members have
14 homes or rent homes at Saratoga for the season?

15 A I would have to think so.

16 Q What?

17 A I would have to think so.

18 Q And they engage in this social whirl during the
19 Saratoga season, is that correct?

20 A I guess.

21 Q So this tradition you are talking about is a party
22 which these people look forward to every year during the
23 course of which purses go up to as high as 107 percent of
24 the handle and these purses are shared by people coming in
25 from all over the country just to take those purses at

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2 Saratoga and do no other racing in the State of New York, is
3 that correct?

4 A Well, other people go to Saratoga too.

5 Q Oh, I am sure that there are, I am sure there are
6 a few natives. But that is not what I asked.

7 THE COURT: I don't really see the point of the
8 question. Obviously there are people who go to Saratoga who
9 go there to get the racing in.

10 MR. MOSS: The point of the question is that it
11 relates back to the prior question of the increased percentage
12 of Jockey Club members who appear at Saratoga as contrasted to
13 those who appear at Belmont and Aqueduct, and the special
14 occasion which has made it Saratoga for them.

15 THE COURT: If there is a percentage of owners, I
16 imagine that is provable by figures.

17 MR. MOSS: Yes.

18 THE COURT: And the rest all follows.

19 MR. HYDE: I don't think there has been any
20 testimony to that effect, your Honor, as to what the
21 percentage is.

22 THE COURT: No, he did not say that.

23 MR. MOSS: I did not say a percentage. I said a
24 large number.

25 THE COURT: If it is relevant, I imagine it is

1 provable. I don't suggest that it has been proven.

2 Q Now with respect to racing applications, applica-
3 tions for stalls, is there any race track in the United
4 States -- don't let me limit myself -- is there any race track
5 in the world that charges for stalls?
6

7 A I don't know.

8 Q Have you ever heard of one?

9 A I can't say as I have.

10 Q They all provide stalls for people who come there
11 to race, don't they?

12 A As far as I know.

13 Q This stall application lists, among other things,
14 the names of the horses; is that correct? Do the horses
15 that a trainer lists as wanting to bring in influence the
16 Racing Secretary in his decision as to how many stalls to give
17 that trainer?

18 A It can.

19 Q In other words, there are horses who are known to
20 be good horses and other horses who are either not known or
21 not known as good horses, is that correct?

22 A That is correct.

23 Q And the Racing Secretary will decide that he would
24 like these horses rather than those horses, is that correct?

25 A That is part of his job, yes.

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1 Q Part of his job.

2 THE COURT: I assume in Man O' War's day it is
3 unlikely that he would have been refused a stall.
4

5 THE WITNESS: That is correct, sir.

6 Q So that when a trainer puts in, as was given to
7 you as an abstract proposition, an application for thirty
8 stalls, the Racing Secretary's judgment in allotting him
9 twenty, for example, would be based upon the horses and their
10 quality which he presents; isn't that so?

11 A That is so.

12 Q A Racing Secretary would not be very happy if the
13 ten stalls which were denied, if ten stalls were denied, he
14 took away ten of the good ones and put in ten of the duds
15 instead, would he?

16 A I don't think so.

17 Q So that there is not an absolute discretion on the
18 part of the trainer, is there? He brings in the horses that
19 the Racing Secretary wants to come in, does he not?

20 A That is up to the trainer.

21 Q But the trainer has to --

22 THE COURT: I imagine the trainer has the same
23 interest in getting good horses there that the Racing
24 Secretary has.

25 MR. MOSS: This was brought up, if your Honor

1 please, to show that these people have no control, that the
2 trainer has the control.
3

4 THE COURT: Yes, but I don't think the question
5 adds anything. If a trainer has a Man O' War he is going to
6 bring him in. The Secretary is going to want him to bring him
7 in. If the Secretary has a dud, he is not going to want to
8 bring him in.

9 Q Is that true?

10 A Yes.

11 Q Doesn't the trainer include some duds with his
12 other horses to keep a stable together and bring in as many
13 as he can?

14 A Yes.

15 Q That is true, isn't it?

16 A Yes.

17 THE COURT: You mean a trainer deliberately leaves
18 a good horse out and brings a dud in?

19 THE WITNESS: No, sir, not deliberately.

20 Q But he will add some of the duds to the good
21 horses. Normally if a trainer asks for more stalls he is
22 going to get it?

23 A Usually they do.

24 THE COURT: I don't see the point of your question.
25 It seems to me obviously the racing association wants the

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2 best horses it can get.

3 MR. MOSS: That is true.

4 THE COURT: Equally obviously, it would seem to me,
5 if a trainer had a reputation of bringing in duds, he would
6 not get them in.

7 MR. MOSS: That I am going to bring out by
8 questioning, but let me answer your Honor first: A trainer
9 may have a stable consisting of about, let us say, fifteen good
10 horses and five duds. He is going to ask for stalls for all
11 of them; he is going to want to bring them in.

12 THE COURT: If he gets ten he brings in the ten
13 good ones.

14 MR. MOSS: If he only gets ten.

15 THE COURT: Right.

16 MR. MOSS: In certain circumstances he won't.
17 Suppose I am a trainer, and I have an owner A and owner B.
18 Owner A has two or three very good horses and several duds.
19 I may have to bring in owner A's duds because I want his
20 horses in there, in preference to another owner's horses who
21 might be better.

22 THE COURT: If I was a Racing Secretary, I would
23 try to stop you from doing that.

24 MR. MOSS: Exactly, exactly. The Racing
25 Secretary stops him. It is not up to the trainer.

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THE COURT: No, but as I gather it is up to the trainer, but if he does that for too many times he will be stopped.

MR. MOSS: The trainer will try to do it. But the Racing Secretary says to him, "These are the horses I want. Don't bring in these duds."

THE COURT: Does that happen?

THE WITNESS: It has happened on occasion.

THE COURT: All right.

THE WITNESS: Yes, sir.

Q Even when it does not happen explicitly, implicitly the trainer knows that he had better bring in his better horses and not his duds, isn't that so?

A True.

THE COURT: That seems to me inevitable. How can you run a racing course unless that is true?

MR. MOSS: Your Honor, I am not arguing that. I am arguing the attempt here to say, "We have nothing to do with this, we don't control anything. The trainer does what he likes." But he does not. The trainer cannot do what he likes.

THE COURT: All right, go ahead. It seems to me that what you just brought out is what I would infer from what had been said on direct examination.

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MR. MOSS: You might have inferred it, and I hope you did on direct examination, because I think it came out on direct.

THE COURT: Yes. I mean on cross is what I refer to.

MR. MOSS: Well, on cross I think it is the exact opposite.

THE COURT: I would have inferred exactly what you just brought out from the cross-examination.

MR. MOSS: I am glad you did, then, your Honor, because I thought that they were attempting to get a different inference, namely, that the Racing Secretary left it entirely up to the trainer and what ever horses the trainer chose to bring in, good or bad, that was the way it was.

THE COURT: It certainly was clear to me on cross-examination that the function of the Secretary was to get the best horses possible into the track.

Is that what you were intending to prove, because that is what I thought you were proving?

MR. HYDE: Yes, that is one of the factors that the Racing Secretary would take into consideration, if not the primary factor.

BY MR. MOSS:

Q With respect to the 2-year-olds, you say that they

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begin to race in April but some brought them in in March; is that what I heard you say?

A I said they could be brought in in March.

Q They could be brought in. Why would you use the stalls in March for horses that were not going to do much racing if any until April?

A I wouldn't use them. The trainer would have them. The thing is that if in the trainer's opinion the 2-year-old is maturing and getting progressively better in training, he would want to bring him in to get him ready at a race track to have him schooled so that when the first 2-year-old races started he would be ready under racing conditions to run his horse.

Q Is it a rule, either written or oral, or understood at your tracks, that stalls are in short supply and that horsemen must race their horses out of stalls which they have?

A We try and make the best use we can out of every stall.

Q And that is normally for having them occupied by horses that are engaged in racing, isn't that so?

A That's true.

Q Is it not a fact, then, that the owner of the 2-year-old who brings his horses in a month early for the

1 wctb Hyland - redirect 110
2 purpose of training them and conditioning them is using those
3 stalls of the New York Racing Association for training
4 purposes, some of them, instead of other facilities, and
5 displacing people who might be using those stalls for horses
6 that are racing there?

7 A It is conceivable, but I can't give you any
8 specific example.

9 Q No.

10 THE COURT: The point is that if a horse is there
11 in March and not going to race until April, he is obviously
12 displacing a horse that might be racing in March.

13 THE WITNESS: True. However -- well --

14 THE COURT: However what?

15 THE WITNESS: A trainer is paid to use his judgment
16 as to how fit a horse is for running and when he is ready to
17 run. Very few owners and trainers bring 2-year-olds in
18 prematurely.

19 Q The various officials, including yourself, whom you
20 have mentioned are appointed by the Jockey Club and the NYRA,
21 respectively, as you said, subject to the approval by the
22 Racing Commission.

23 A Yes. I am the only one appointed by the Jockey
24 Club. The rest are appointed by NYRA.

25 Q At one time you were appointed by the NYRA?

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2 A Correct.

3 Q In the entire history of the New York Racing
4 Association and the Jockey Club do you know of one single
5 instance where an appointment made by the racing association
6 or the Jockey Club was questioned in any way by the racing
7 commission?

8 A When you say questioned, Mr. Moss --

9 Q Was turned down, put it that way.

10 A I can't remember anyone being turned down.

11 Q Do you know of one single instance in which the
12 racing commission asked a question of any candidate or anybody
13 who was appointed by the Jockey Club or the racing commission?

14 A I am not aware of what the racing commission does,
15 Mr. Moss.

16 Q Did they ever question you?

17 A No, sir.

18 MR. HYDE: Your Honor, I object to this line of
19 questioning. I don't think --

20 MR. MOSS: He opened this up.

21 MR. HYDE: -- the question of whether the racing
22 commission performs its function, how it performs its
23 function, is within the scope of this antitrust case. The
24 fact is that the legislation --

25 THE COURT: How is it relevant?

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2 MR. MOSS: It is relevant in this way -- I hate to
3 say this in advance, but I will: As a practical matter, these
4 people know that they have to look to their appointment, to
5 their employers, the NYRA --

6 THE COURT: That is apparent to me already.

7 MR. MOSS: -- exclusively. Yes. Now I am coming
8 to the next thing, which is -- I don't know whether it will
9 be conceded or not; if not, I can prove it -- that the racing
10 commission exercises no control over the firing of these
11 people.

12 THE COURT: Firing?

13 MR. MOSS: Firing.

14 THE COURT: It has statutory control.

15 MR. MOSS: No.

16 THE COURT: It has no right to fire?

17 MR. MOSS: And I will read you Commissioner
18 Gimma's testimony, the Chairman of the commission, who said,
19 "We assert no control over the firing. That is up to the
20 tracks entirely." I don't know whether he wants to concede
21 that or not. If not, I will bring him in to say so.

22 MR. HYDE: I don't know of any evidence with
23 respect to firing the man. The statute provides for approval
24 of the man. If at the end of the year his contract is not
25 renewed and somebody else is appointed in this position in

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the next year, again the racing commission has to approve that appointment. But all of these appointments are on an annual basis as provided by law. They may or may not be renewed in the following year.

THE COURT: Does he have to be approved by the commission every year?

MR. MOSS: Yes.

MR. HYDE: Yes.

MR. MOSS: But, your Honor, my point as far as relevancy is concerned is this: These people know as a matter of practice that --

THE COURT: I know that. You don't have to bring it out.

MR. MOSS: All right.

THE COURT: Obviously you look to your boss.

MR. MOSS: Exactly.

THE COURT: For your job.

MR. MOSS: Exactly. ^{In Court.} And the legislature knew that when they set up the system.

MR. MOSS: Yes.

THE COURT: It seems to me an extraordinary system, but I am not here to pass on the wisdom of the New York legislature.

MR. MOSS: That is right.

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2 BY MR. MOSS:

3 Q You said that no member of the Jockey Club or of
4 the New York Racing Association ever came to you to influence
5 you or any other one to your knowledge about how to do his
6 job, is that correct?

7 A That is correct.

8 Q On the other hand, let me ask you, to paraphrase
9 the judge's remarks: Is there any doubt in your mind that
10 you as well as every other official knew who had appointed
11 them and knew who their bosses were and who could fire them?

12 THE COURT: There is no claim here that this man
13 is incompetent.

14 MR. MOSS: None at all.

15 THE COURT: All right, he knows who appointed him.

16 MR. MOSS: If your Honor please, I am perfectly
17 aware that some of this is obvious to your Honor as it is to
18 me, but I would like to put it on the record, that is all.

19 THE COURT: It is obvious to everyone. You can
20 ask him whether this knowledge influenced him. The point is
21 that you know you are appointed by the --

22 THE WITNESS: Jockey Club.

23 THE COURT: -- Jockey Club.

24 THE WITNESS: Yes.

25 THE COURT: Subconsciously at least that must

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influence your action is some way or other. Does it influence your action consciously as far as you know?

THE WITNESS: Not even subconsciously.

THE COURT: Well, you don't know what happens subconsciously.

THE WITNESS: No, sir, it doesn't.

THE COURT: Consciously it doesn't?

THE WITNESS: No.

Q When you talk about registration of colors and other things, if there is any dispute about this, that is decided by the Jockey Club; is that correct?

A Yes.

Q With respect to the Jockey Club rules which you said were made to cover every conceivable situation in racing?

A At that time.

Q At that time. Isn't there a general Jockey Club rule which says that anything which you consider contrary to the best interests and usage of the turf is a reason for you to exclude anybody?

A Could be.

MR. HYDE: May we have that rule that you are referring to?

MR. MOSS: I don't have it right here. It is in the racing commission rules.

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MR. HYDE: Are we talking about racing commission rules?

MR. MOSS: He testified that it was taken from the Jockey Club rules. I think it is in those anyway.

THE COURT: I don't know the relevance, but if we are talking about that, let us look at the document.

MR. MOSS: Right.

THE COURT: Because he just says it might be.

MR. MOSS: I have no other questions.

MR. HYDE: I have no questions.

THE COURT: Step down.

(Witness excused.)

MR. MOSS: Your Honor, I do not know what your Honor's schedule is, but rather than just start another witness for a short time and adjourn --

THE COURT: Well, we could go until 1 o'clock.

F R A N K M. B A S I L, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

THE WITNESS: I reside at 32 Bolan Drive, Huntington Station, New York.

DIRECT EXAMINATION

BY MR. MOSS:

Q Mr. Basil, were you at one time connected with the

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2 New York Racing Association?

3 A Yes.

4 Q Were you its President in fact?

5 A Yes.

6 Q During what period of time, please?

7 A I can't hear you.

8 Q During what period of time, please?

9 A I was President and chief operating officer from
10 February 12, 1969, through August 1972.

11 Q Prior to that had you had any connection with the
12 racing association?

13 A Yes. I was Vice-President, Treasurer and
14 Controller.

15 THE COURT: President and what?

16 THE WITNESS: President and Controller.

17 Q How long was that?

18 A As a matter of fact, I am still executive director
19 of the finance committee. I want the judge to know that I am
20 not resigned or anything.

21 Q Were you present at the birth, so to speak, of the
22 New York Racing Association?

23 A You want to stand over here, please? You know my
24 difficulty.

25 Q I am sorry.

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THE COURT: Were you present at the birth of the New York Racing Association?

THE WITNESS: Yes, I was.

Q Will you tell us something of the way this all started and how it began, please.

A Well, this is an event that took place twenty years ago. I will try and refresh my memory the best I can, and what I learned and what I participated in.

As I understand it, in August 1953, at Saratoga, at a Jockey Club meeting, the Chairman of the New York Racing Commission --

THE COURT: Who was he, do you know?

THE WITNESS: He was Ashley C. Cole, deceased now.

A -- suggested that the Jockey Club come up with a plan to rehabilitate the race tracks, because he was concerned with the deterioration of the present racing structure and the downward trend in handle and attendance, and he was concerned with the decline in the state's revenue.

THE COURT: Even in those days the state got a percentage of the handle?

THE WITNESS: That is right. They got it from the predecessor companies that were in existence.

A In 1954 a committee was formed. The members were Johnny Hanes, Captain Guggenheim, and Christopher T. Chenery.

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They presented a plan to the racing commission after the feasibility studies were prepared which showed that they could finance the acquisition of the properties of the existing tracks and also to finance the contemplated improvement.

We filed this application with the New York State Racing Commission, and after a public hearing the New York State Racing Commission approved our plan and we proceeded to acquire the property.

Q Can I interrupt just a minute. These three names you mentioned -- Mr. Chenery, Mr. Hanes, and Captain Guggenheim --

A Yes.

Q -- were the Jockey Club committee, is that correct?

A Yes.

Q Appointed by the then acting chairman of the Jockey Club, Ogden Phipps?

A I really don't know who appointed them. I know that these were the three people on the committee.

Q Go ahead.

A In February 1955, sponsored by the New York State Racing Commission, legislation was passed enabling the implementation of the so-called Jockey Club plan. We went ahead -- they gave us a 25-year franchise, and the corporation was able to go ahead --

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1 THE COURT: The corporation being?

2 THE WITNESS: Well, it's now New York Racing
3 Association, but then it was called Greater New York
4 Association.
5

6 THE COURT: I see.

7 THE WITNESS: Incorporated, acquired the physical
8 properties of the predecessor race track at a cost of
9 \$20,000,000.

10 THE COURT: These three race tracks we are talking
11 about?

12 THE WITNESS: We are talking about Aqueduct,
13 Jamaica, Belmont, and Saratoga. There were four race tracks.

14 THE COURT: What happened to Jamaica?

15 THE WITNESS: Jamaica was abandoned after one year
16 of racing.

17 THE COURT: These four race tracks, were they owned
18 by one corporation?

19 THE WITNESS: They were owned by four corporations.

20 THE COURT: Four corporations.

21 THE WITNESS: Yes. It was the Metropolitan Jockey
22 Club, the Queens Jockey Club, Saratoga Racing Association,
23 Belmont was called Westchester something -- why it was called
24 Westchester I don't know -- it was out in Nassau. But those
25 were the four companies.

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THE COURT: This was a negotiated purchase?

THE WITNESS: They were arm's-length bargaining, and in fact I negotiated for the price of the Queens Jockey Club. And we purchased the properties at a cost of \$20,000,000. I might add that the real estate value alone is over \$250,000,000 now.

THE COURT: In other words, it was a good deal?

THE WITNESS: Damn good deal.

Q The twenty trustees were chosen from the Jockey Club, is that correct?

A I really don't know whether they were chosen from the Jockey Club. I know that in the regular procedures that the stockholders would elect the directors or trustees. I don't know who --

Q But the actual ones they elected were all Jockey Club --

A You are turning your back on me, Jesse.

Q I am sorry. The actual ones they elected were all Jockey Club members, is that correct?

A I would say now, yes.

Q You spoke about the stockholders. These twenty men were the stockholders, is that correct?

A Of the New York Racing Association?

Q Yes.

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2 A Yes.

3 Q How much did each one pay for all of his stock?

4 A \$50. They each owned five shares.

5 Q And they each put in \$50 apiece, is that correct?

6 A That is correct. \$10 par value stock and they put
7 in \$50 apiece.

8 THE COURT: I thought this was a nonprofit
9 organization?

10 THE WITNESS: Well, it's really nonprofit under law,
11 but it really is nondividend-paying. In other words, you
12 can't pay any dividends out and nothing can inure to the
13 stockholders. They can't get any capital gains or profits
14 out of this.

15 Q They paid \$50 apiece?

16 A Yes.

17 THE COURT: Can they sell that stock?

18 THE WITNESS: They can't.

19 THE COURT: They cannot?

20 THE WITNESS: They cannot.

21 MR. MOSS: I am going to get into this area right
22 now, if your Honor please.

23 Q Did they invest any other of their personal money
24 into this corporation?

25 A No.

2 Q Did they lend any money?

3 A No.

4 Q Did they guarantee any money?

5 A Except by their character.

6 Q By their character. But did they guarantee by
7 signing their names?

8 A No.

9 THE COURT: Where did you get the \$20,000,000 from?

10 MR. MOSS: That is what I am coming to.

11 THE WITNESS: I can tell you, if it doesn't disrupt
12 him.

13 Q You borrowed that from some banks, did you not?

14 A Yes. It is a long story.

15 Q I know. I am going to try to make it short. One
16 of the provisions of the law, Mr. Basil, was that they could
17 use the first \$5,000,000 of pari-mutuel funds to secure loans
18 under certain conditions, is that correct?

19 A The first \$5,000,000 of pari-mutuel revenue was
20 assigned to the collateral agent of the bank. It was not a
21 form of security.

22 Q What was assigned was collateral?

23 A It was a provision that you assign the first
24 \$5,000,000 to the collateral agent.

25 Q And that included what would have been the state's

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2 share of that?

3 A That is correct.

4 Q And the state permitted that to be done in order
5 to help raise the funds, is that correct?

6 A That is right. What do you mean by raise the funds?

7 Q The \$20,000,000.

8 A Well, it might have sweetened the negotiations with
9 the banks, yes.10 Q I would think so. Then you acquired the real
11 estate, is that correct?

12 A We acquired the physical properties, yes.

13 Q And then you got some more moneys by mortgaging
14 the real estate in turn, is that correct?15 A No, we had already mortgaged the real estate that
16 we bought when we made our first loan. \$13,000,000 mortgage.17 Q And in addition to that, there was the character
18 of the trustees?

19 A There was what?

20 Q The character of the trustees.

21 A Yes. And some persuasion on my part.

22 Q The New York Racing Association operates three
23 race tracks, does it not?

24 A They owned and operated three race tracks.

25 Q They still do?

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A They still do.

Q Percentagewise are the purses in relationship to the handle taken in the same at Saratoga as they are at Aqueduct and Belmont?

A No.

Q Are they very substantially higher at Saratoga than they are at Aqueduct and Belmont?

A In relation to the handle, the wagering at, it is much higher at Saratoga.

Q As a result, taking 3 percent which is the present amount given to purses as an illustration, as a result of that do the purses paid at Saratoga go above 3 percent while the ones at Aqueduct and Belmont go below 3 percent?

A Well, I know at Saratoga they go above 3 percent, but I am not sure they go below 3 percent at Aqueduct and Belmont.

Q If the purses at Saratoga are substantially higher, is that correct?

A Yes.

Q Where does the money come from?

A Where does the money come from?

Q To pay purses like that, yes. It does not come from the handle, does it?

A No. Couldn't possibly come from the handle.

2 Q Where does it come from?

3 A Let's look at the figures. The average overnights
4 are the same at the three tracks. We try to make them the
5 same. It is the amount of stakes you run at Saratoga that
6 accounts for the high percentage, part of the high percentage.
7 You got to remember that when one -- these three tracks are
8 all under the one umbrella, and as I think I heard some
9 testimony today that the stake race program is programed so
10 that it attracts the quality horses at the right time of the
11 year and it is spread out over the racing period. And some
12 of the best stake races are run at Saratoga because the horses
13 are ready for it.

14 If you take the stake races, and if you allocated them
15 over the whole company, I would say that the amount of money
16 that we give out at Saratoga might be compared to Aqueduct
17 and Belmont.

18 Q You have given me the reason why, but I would like
19 to know the fact: Where does the money to pay the extra
20 amounts of purses paid out, where does the money come from?

21 A From the general fund.

22 Q By general funds, you mean money generated at
23 Aqueduct and Belmont, do you not?

24 A By our entire operations.

25 Q There is no surplus of general funds generated at

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2 Saratoga, is there?

3 A The New York State legislature saw to that.

4 Q No, there isn't. So the only source of your other
5 general funds --

6 A Is your racing operation, yes.

7 Q Is in Belmont and Aqueduct, right?

8 A That's right.

9 Q Do a larger percentage of Jockey Club members race
10 at Saratoga in comparison to all the horsemen who race there
11 as contrasted with those who race at Belmont and Aqueduct?

12 A I have never kept track of it.

13 Q Were you president of the NYRA at a time when an
14 agreement was made with the Jockeys Guild with respect to
15 racing jockeys' fees?

16 THE COURT: Agreement was made with whom?

17 A I don't understand that.

18 MR. MOSS: The Jockeys Guild.

19 THE COURT: Jockeys what?

20 MR. MOSS: Jockeys Guild.

21 THE COURT: Oh, Guild.

22 MR. HYDE: Your Honor, I object to this question
23 on grounds of relevance. There are no allegations in this
24 complaint with reference to the Jockeys Guild. I don't know
25 what this has to do with the case.

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2 MR. MOSS: I will explain. There is no allegation
3 with respect to this in the complaint, agreed. The complaint
4 also mentions a continuing conspiracy. As it turns out,
5 there was another act which we believe to be an antitrust
6 violation which occurred during this period of time or
7 slightly subsequent to it, and I feel we are entitled to
8 present it to this Court.

9 MR. HYDE: I don't know what the Jockeys Guild has
10 to do with any antitrust violation alleged here. I think there
11 should be some offer of proof.

12 THE COURT: That is subject to a motion to strike.

13 Q Were you president when an agreement was made with
14 the Jockeys Guild?

15 A I don't understand what you mean by -- what
16 agreement? I have made thousands of agreements. What
17 agreement are you talking about?

18 Q Was there an agreement made with the Jockeys Guild
19 a couple of years ago to the effect that their jockeys' fees
20 would be increased, the jockeys' fees charged by horsemen in
21 the absence of a separate prior agreement, and that the New
22 York Racing Association would automatically deduct those fees
23 from the horsemen's purses?

24 A I have no recollection of an agreement or written
25 agreement. Now let me give you the history of that. The

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2 Jockey Guild sent a letter to the New York --

3 THE COURT: I take it the Jockey Guild is a union
4 of jockeys?5 THE WITNESS: It's a union of jockeys. You named
6 it right. They call it a guild, but it is really a union.
7 They sent a letter advising us that if they did not get the
8 increased fees they would take legal action. I brought that
9 letter to the attention of the board. We called in some
10 leading horsemen of the HBPA, discussed it with them, and they
11 came up with this arrangement, they did, the horsemen did.
12 We had nothing to do with it. We are just the --

13 Q Who was present on behalf of the HBPA?

14 A Let me see now. I think it was Elliott Burch was
15 one of them. I don't know whether he is a member of the HBPA,
16 but he is a horseman.

17 THE COURT: A horseman is a fellow who owns horses?

18 THE WITNESS: Well, they call themselves horsemen.
19 They are really trainers.

20 THE COURT: I see.

21 THE WITNESS: You ask them, "Who do you represent?",
22 and they call themselves horsemen, but they are really
23 representing the owners, the trainers.24 THE COURT: The horseman is not the owner, he is
25 the trainer?

2 THE WITNESS: No, the horseman in my definition is
3 the owner. But when they refer to anybody that handles
4 horses in the backstretch, they call them the horsemen. I
5 can't think of the other people. There was Nick Jemas.

6 Q Nick Jemas is head of the Jockeys Guild?

7 A That's right. There was Elliott Burch, Johnny
8 Narud.

9 Q Burch and Narud both trained for trustees and
10 members of the Jockey Club, did they not?

11 A Beg your pardon?

12 Q Burch and Narud both trained for trustees and
13 members of the Jockey Club, did they not?

14 A Let me see, Johnny Narud? Yes. Elliott Burch?
15 Yes.

16 Q Was there any member of the HBPA present at that?

17 A I don't know whether Gene Jacobs was there or not.
18 I know it was discussed with the horsemen.

19 Q By the horsemen, you mean Burch and Narud?

20 A No, no.

21 THE COURT: Gene Jacobs is who?

22 THE WITNESS: Gene Jacobs is now the president of
23 the HBPA.

24 THE COURT: Did you discuss it with him?

25 THE WITNESS: I didn't discuss it with him. I know

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that it was a matter of discussion among the horsemen when this was brought to their attention.

Q Is it not a fact or did you not know -- let me put it that way -- that the horsemen as represented by the HBPA refused to agree with the Jockeys Guild about an increased jockeys' fee?

A I had no such idea. All I know is that they paid it.

Q After you took it out?

A Oh, no.

Q And after you agreed with the Jockeys Guild?

A Look, why don't you say things right? We have a right to deduct the jockeys' fee. That is under the New York State Racing Commission's rules, and it has to be in cash as a matter of fact.

Q Right.

A And at the prescribed fees, unless the jockey has made some kind of an agreement with the owner or the trainer.

Q Now let me pick --

A If they file that, we don't take the prescribed fee --

Q Let me pick on the prescribed fee. Who prescribed the fee? In other words, did you agree with the Jockeys Guild as to the fee which the horsemen were going to pay?

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2 A No, I did not. We just told them we would bring
3 it up with the horsemen. There was some dissension, yes.

4 Q Did you say that that came up at a meeting before
5 the board of trustees?

6 A I just informed them of the letter that I had
7 received, which is an operating thing.

8 Q Did you ever get anything back as to the action
9 taken on that letter?

10 A Beg your pardon?

11 Q Did you ever get anything back as to the action
12 taken on that letter?

13 THE COURT: I don't know what that question means.

14 A I don't know what that means.

15 Q Did you ever get a memo from the board of trustees
16 as to what they did about it?

17 A No.

18 Q But you do know that thereafter this increase went
19 into effect and was deducted from horsemen's purses, is that
20 correct?

21 A That is correct.

22 Q What are pony lead fees, Mr. Basil, pony lead fees?

23 A Pony lead fee is a State Racing Commission rule
24 that if you want your horse to be not part of the parade to
25 the post and you want to use a lead pony to keep the horse

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quiet and less tension, you pay a \$10 fee to the association.
That is in the racing commission's rules.

Q Right. To the association.

A To the association.

Q What does the association do with those pony lead fees?

A We could keep it but we don't.

Q You don't, exactly. What do you do with them?

A We give a percentage to the Jockey Club Foundation, which is a charitable organization, to take care of any indigents in the backstretch, and the balance is used, plus supplementary cash from our own fund, to set up a welfare backstretch insurance trust for the backstretch people.

THE COURT: What are backstretch people?

THE WITNESS: Your Honor, these are the people that -- why they ever call it backstretch: it's behind the other side of the track where the barn area is and where all the people associated with the training of horses and the running of them congregate, and they call that the backstretch. They include grooms, apprentice boys, exercise boys, hot walkers, assistant trainers, foremen, and trainers.

Q There was a dispute with the HBPA a few years ago at which the HBPA wanted a pension fund for the backstretch employees, is that correct?

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2 A They didn't dispute it with us.

3 MR. HYDE: Your Honor, I object again.

4 Q I did not say "they."

5 MR. HYDE: I don't know what this pension plan has
6 to do with any antitrust violation.

7 MR. MOSS: I am coming to that. Please, I need a
8 preliminary question or two.

9 THE COURT: I will allow the question, see where it
10 gets him.

11 You said there was a dispute or there was not a
12 dispute?

13 MR. MOSS: Let me put it this way, if your Honor
14 please:

15 Q Did the HBPA ask for a pension plan for the back-
16 stretch employees a few years ago? Did they advocate one?

17 A Who did they ask?

18 Q The HBPA.

19 A Who did they ask?

20 Q They asked at different times the state legislature
21 and they asked for funding if possible from the NYRA, did they
22 not?

23 A They first proposed five charity days through their
24 own bill filed with the legislative body.

25 Q Right.

1 A It was not acted on.

2 Q Right.

3 A And as a result they struck NYRA, who was not
4 involved in it, for nine days.

5 Q In other words, they stopped racing for nine days.

6 A Until the Attorney General got a preliminary
7 injunction against them.

8 Q And they stopped racing for nine days at Aqueduct,
9 is that correct?

10 A Yes.

11 Q At this time this pony lead money was not devoted
12 to any pension plan, was it?

13 A No.

14 Q This entire pension plan to which you are devoting
15 pony lead money all happened substantially after the commence-
16 ment of these lawsuits, did it not?

17 A You don't know what you are talking about. In the
18 first place --

19 Q The pension plan --

20 A The pension plan now is supported by a percentage
21 taken from the owners' purses won.

22 Q Right.

23 A And they are his employees.

24 Q Right.

2 A And they are their own pension plan.

3 Q What is the pony lead money devoted to?

4 A To the backstretch welfare insurance plan. It
5 takes care of the hospitalization --

6 Q How long has that been so?

7 A My God, that is going back to 1961, and I think we
8 put in over a million dollars in that.

9 Q That was part of the pony lead money?

10 A That is all of it.

11 Q I thought part went to --

12 A A part went to the Jockey Club, yes.

13 Q All right.

14 A And we put in some of our own money in that.

15 Q The Jockey Club Foundation is a charitable
16 organization operated by the Jockey Club, is that correct?

17 A I have no idea who operates it. It is called a
18 Jockey Club Foundation.

19 THE COURT: What does it do with its money?

20 THE WITNESS: It is a charitable organization and
21 presumably, as I understand it, they use it to take care of
22 the indigents in the backstretch, people that are out of
23 jobs and hard hit. They do an effective job, I understand.

24 Q Not in New York necessarily?

25 A I beg your pardon?

Q Not in New York necessarily?

A I don't know.

Q They do that all over the country with that money, don't they?

A I don't know.

Q Do you know of any reason why the New York Racing Association uses its funds generated here in New York for that purpose, to give it to the Jockey Club Foundation?

A I think it was a practice that we inherited.

THE COURT: From whom?

THE WITNESS: From our predecessor company.

MR. MOSS: I have no other questions.

MR. HYDE: Your Honor, I move to strike this entire line of testimony with respect to the pony lead fees, the racing pensions, welfare funds. I don't think it has anything to do with any of the issues in this case.

THE COURT: I will reserve decision on that motion. I don't see what it has to do with it at this point, but maybe I will learn later. I will reserve decision.

MR. HYDE: May I have just a minute.

If I may have a minute to confer, I will see if I have any questions of this witness.

THE COURT: All right.

MR. HYDE: May I wait until after lunch and

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2 determine then whether I have any questions.

3 THE COURT: 2 o'clock ladies and gentlemen.

4 (Luncheon recess.)

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AFTERNOON SESSION

THE COURT: I understand you have no questions of the last witness?

MR. HYDE: That is right, your Honor, I do not.

MR. MOSS: Mr. O'Brien, please.

P A T R I C K W. O ' B R I E N, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MOSS:

Q Mr. O'Brien, are you employed by the New York Racing Association?

A I am.

Q For how long have you been with them?

A Since its inception.

Q Have you been employed by them in various capacities during that time?

A I have.

Q Will you please take us through that.

A When the company started I was the Director of Publicity; I was then the Assistant Racing Secretary; I was then the Director of Racing Operations; I was then Vice-President of Racing Operations; and I am presently Vice-

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2 President of Operations.

3 Q For a time were you the steward appointed by the
4 New York Racing Association?

5 A I was. Excuse me, for one year I was the steward
6 representing the New York Racing Association.

7 Q Who was the steward representing the New York
8 Racing Association at that time, just before you became
9 steward?

10 A Nathaniel J. Hyland.

11 Q When you were appointed steward, did you request
12 that?

13 A I didn't request it directly. I think anybody
14 would like to be a steward. I think it is an honor.

15 Q You let it be known that you were a candidate, put it
16 that way, or that you were available or that you would like
17 to have it? I mean, any way you like it.

18 A I think the variety of jobs that I have had shows
19 that I am available to do any job I can for the New York
20 Racing Association.

21 Q But you would have liked the steward's job at that
22 point because it was honor, among other things, you said?

23 A That's correct.

24 Q At that point there was a vacancy in the Jockey
25 Club stewardship, was there not?

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1
2 A Yes.

3 Q And Mr. Hyland was moved up to that and became the
4 appointee of the Joskey Club and you were then appointed by
5 the New York Racing Association?

6 A That is correct.

7 Q Then you were assigned that, were you not?

8 A No, I was asked to become Vice-President of
9 Operations.

10 Q You said that Mr. Krumpe, if I recall correctly --

11 A That is correct.

12 Q -- said that he needed you for this purpose and
13 would you take it?

14 A That is correct.

15 Q Were you present at the board of trustees when the
16 racing program was presented to it?

17 A I was when I was Assistant Racing Secretary.

18 Q Are there two separate racing programs? To be
19 more specific, is there a stakes program and an overnight
20 program?

21 A Well, yes, there are two programs, if you separate
22 them between those two. But what we do is, at the beginning
23 of the year we project what our gross business is going to
24 be over the year, take 3 percent of that, and say that is our
25 purse allocation for the year. Now, you got to start some

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2 place, so what we start with is the stake program, which is
3 kind of the backbone of the thing. We offer an entire program
4 for the 42, 44 weeks, whatever it happens to be. That is X
5 number of dollars. The 3 percent minus the X number of dollars
6 is what we use for the overnights. Then with the idea of
7 providing a continuity of racing for this long period of time,
8 we take that X number of dollars and say, like a 2-year-old
9 maiden should run for \$8,000 purse throughout that entire
10 period, a 2-year-old that has won one race should run for
11 \$10,000 throughout that period -- to try and make sure that
12 everybody has an equal opportunity at the money during the
13 entire year.

14 Q Is it true that you are familiar with some of the
15 presentations that Mr. Trotter made to the board of trustees?

16 A Yes, sir.

17 Q Were you present at some of those?

18 A Yes, sir.

19 Q Mr. Trotter was the Racing Secretary in those years,
20 was he not?

21 A He was the Racing Secretary. I was his assistant.

22 Q Is it true that the only thing which Mr. Trotter
23 presented for discussion to the trustees was the stakes
24 program?

25 A Yes.

1 Q Is it also true that they do not concern themselves
2 with the overnight program at all?
3

4 THE COURT: Who is "they"?

5 MR. MOSS: The trustees.

6 A That is correct.

7 Q They discuss the stake program, and eventually
8 approve it. Is that correct?

9 A That is correct.

10 Q Both as to the nature of the program and as to the
11 amounts of money to be paid, is that correct?

12 A That is correct.

13 Q And then they said whatever is left goes to the
14 overnights, and the Racing Secretary does as he pleases with
15 that ?

16 A That is correct. And that is the major portion of
17 the money.

18 THE COURT: Overnights?

19 THE WITNESS: Yes. Predominant. 20 percent stakes,
20 80 percent overnights, rough.

21 THE COURT: Why is it that the trustees only
22 concern themselves with the 20 percent?

23 THE WITNESS: I think the stakes program is, as I
24 say, kind of the backbone of the thing, and it doesn't really
25 change that much. I think that if the Racing Secretary sees

2 where he can improve that stakes program, he submits the
3 change to the trustees, and the reason why, and then I would
4 say uniformly they agree to it.

5 Q You say the stakes program is the backbone of
6 racing?

7 A I didn't say the backbone of racing; it is the
8 backbone of the program. It is where your stars are.

9 Q But would you not say, judging by your experience,
10 that the backbone of racing in most places where racing is
11 held is considered to be the overnights?

12 A That is why we have 80 percent of the money there.

13 Q So the stakes are not the backbone of racing?

14 A Well, it depends on what you call the backbone.

15 Q You called it the backbone. Define what you meant.

16 A It is the backbone around which the rest of the
17 program is planned.

18 Q In New York that is backbone upon which the rest of
19 the program is planned, is that correct?

20 A I would think it is true anywhere.

21 Q But it is true in New York, is that right?

22 A I think it is true anywhere there is racing.

23 Q Is it true in New York?

24 A Surely.

25 Q Would you say that that is the attitude of the

2 board of trustees in New York?

3 A I think it is the attitude of the Racing Secretary.

4 Q I will come to that perhaps. I want to know if it
5 is the attitude of the board of trustees.

6 THE COURT: They approve the Racing Secretary's
7 attitude, in other words?

8 THE WITNESS: Correct.

9 Q In the last analysis anything the Racing Secretary
10 submits is subject to the approval of the board of trustees,
11 isn't it?

12 A If he submits it to the board of trustees --

13 Q Well, he does, doesn't he?

14 A -- it is subject to their approval.

15 Q Right.

16 A If he submits it.

17 Q Doesn't he submit it?

18 A He submits the stake program, yes.

19 THE COURT: I suppose if the board of trustees
20 wanted to they could make him submit the overnight program?

21 THE WITNESS: Correct.

22 THE COURT: But they don't.

23 THE WITNESS: They made a suggestion at one time,
24 "Let's try to have a feature every day worth \$15,000." That this
25 was completely unique in American racing. The Racing Secretary

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2 said, "OK, I'll try it." It was a tremendous success. That
3 is the last time that I remember anything connected with the
4 overnight program and board of trustees.

5 THE COURT: They still do that?

6 THE WITNESS: Yes. Only it's gone up from \$15,000
7 to \$25,000.

8 Q That is the overnight program you are talking about?

9 A Yes, sir.

10 Q When they discuss a program, do they ever discuss
11 things like the distance of racing? When I say "they," I am
12 talking about the trustees.

13 A They look at the distances submitted by the Racing
14 Secretary, and they are constant over the year. Any change
15 might be, if we change our dates, and let's say we go to
16 Belmont a week earlier than last year, you might run a
17 different distance to conform to the size of Belmont Park as
18 against Aqueduct.

19 Q First, before we get the explanation, may I have
20 the answer: Do they discuss the distances at which these
21 races should be run?

22 A Well, I don't know whether you say discuss them.
23 They see them. They have them submitted to them. If it is
24 the same as it was last year, I wouldn't think they would
25 discuss it.

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Q Do they discuss the question of whether certain races should be run on grass or dirt?

A The program submitted by the Racing Secretary states whether the race should be on the dirt or on the grass. Again, as I say, if it was the same way as it was last year, I wouldn't think they would discuss it.

THE COURT: What they discuss is up to them?

THE WITNESS: Right.

Q Do you remember this question on a trial recently, the trial of the HBPA against the NYRA, in which you were a witness, and I refer to page 165.

THE COURT: Is that the one in the Supreme Court? Is that the one in the Supreme Court?

MR. MOSS: Yes.

Q I read to you this question and this answer:

"Question: Did they ever discuss whether they should have more or fewer turf" -- races, it is meant there -- "as compared to grass races?

"Answer: Well, I think -- yes, when we got the extra grass course.

"Question: Then there was a discussion whether certain races should be run on the grass or on the turf, is that correct?

"Answer: That is correct."

1 Do you recall those questions and answers?

2 A I do.

3 Q Are those questions and answers correct?

4 A Yes, sir.

5 Q "Question: Did they also occasionally suggest
6 changes in distance for races?

7 "Answer: Again it would be minimal.

8 "Question: Did they ever suggest" -- and then there was
9 a colloquy, interruption --

10 "Answer: The changes if any would be minimal.

11 "Mr. Moss: Now, I move to strike that, No. 1, as not
12 being responsive," and so on.

13 "The Court: The motion is granted.

14 "Mr. Moss: They do make changes. I beg your pardon.
15 I should have listened a little harder.

16 "Question: In any event, they do make suggestions such
17 as to different distances in these races, is that correct?

18 "Answer: Yes."

19 Do you recall that question and answer?

20 A I do.

21 Q Is that correct? Was your question and answer
22 correct there?

23 A Yes, sir.

24 THE COURT: Was the answer correct? He has no

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control over the question.

Can I inquire what the significance of this is?

MR. MOSS: Yes. There will be testimony by Mr. Phipps and by Mr. Hanes and by others to the effect that the distance of a race -- and these were all stake races -- that the distance of a race and whether it is on grass or dirt affects the chances of a horse of winning, because some horses run better on grass than dirt and vice versa and some horses are distance horses compared to --

THE COURT: Never having been in a race track I know that myself. What is the purpose of the question?

MR. MOSS: The purpose of it is simply this: Mr. Morris testified, and so did Mr. Vanderbilt, that, human nature being what it is, people on the board of trustees who had horses that were good on grass plunked for grass races on the program, those that had horses that were good on dirt plunked for dirt races and similarly with distances.

MR. HYDE: I don't recall any such testimony.

MR. MOSS: I will read it into the record before we are done. And that these people therefore were acting as trustees in making up a racing program which would favor the horses which as individuals they were racing in this program, and there were races being made to suit these horses which they owned in their capacity as individual horsemen.

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2 THE COURT: My point is that I don't see whether
3 it makes any difference whether they discussed it or not.
4 They had the power to do it.

5 MR. MOSS: I want to show the power was exercised.

6 THE COURT: It could be exercised by their not
7 doing it. By their saying nothing your argument would be the
8 same.

9 MR. MOSS: Your Honor, I want to show an act of
10 control and, to the extent possible, because a lot of these
11 things are very subtle, a real meaningful purpose on the part
12 of these people to do whatever they could to help themselves
13 as individual horsemen racing against other horsemen.

14 THE COURT: That you are certainly entitled to
15 show. But the fact whether they discussed it or not -- all
16 right, I will keep quiet.

17 MR. MOSS: I thought in an antitrust case these
18 discussions went to the very heart of the matter.

19 THE COURT: I understand, but they have the power
20 to do this. Whether they talk about it or whether they just
21 silently do it, it seems to me is irrelevant.

22 MR. MOSS: I have to show two things: No. 1,
23 abuse of the power.

24 THE COURT: Yes.

25 MR. MOSS: Which I can show, because if a man in

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making up a race program pays attention to how he is going to get the benefit of it when he races his horse under it, I have shown an abuse of power.

THE COURT: I don't know if you have or not. The legislature put these people in this situation.

MR. MOSS: But they were not going to allow them to act corruptly.

THE COURT: Corruptly is another thing. Just because a man subconsciously favors himself, I don't know what --

MR. MOSS: If you Honor please, the theory of my case, which your Honor may very well disagree with, is that, subconsciously or otherwise, if they use this power to favor themselves they are in violation of the law. It is as simple as that. That is our case.

THE COURT: It seems to me that it is a hard position to take in view of the fact the legislature put them in that position.

MR. MOSS: The legislature put them in a position of managing the race track. As Mr. Hyde said before, their position is the same as if they were private race track owners.

THE COURT: Yes.

MR. MOSS: They now have a monopoly position, either

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2 by the legislature or otherwise. There is no question that
3 they have the monopoly power and the anti-competitive power,
4 the power to destroy or disadvantage competitors. This power,
5 assuming it was given to them legitimately and exercised by
6 them legitimately, is perfectly legal and proper. Assume
7 that. Then they begin to use it for their own personal
8 advantage, wearing a different hat in a different capacity.
9 That is what we say is a violation of the antitrust law.
10 That was our argument from the very beginning. We never
11 claimed anything else.

12 THE COURT: If you show, assuming we have a
13 relevant market -- and that I have not given any thought to,
14 because I did not realize the problem until it was mentioned
15 this morning --

16 MR. MOSS: We do not think that is a big problem.

17 THE COURT: But if you show that they deliberately
18 disadvantaged others to their own advantage, then we have
19 something.

20 MR. MOSS: Yes.

21 THE COURT: If all you show is that they were aware
22 of their own interests at the time they were acting, the
23 legislature must have known they were going to do that.

24 MR. MOSS: I question whether the legislature
25 would be glad to hear that it must have known that they would

1 use their position in their own interests as horsemen vis-a-vis
2 other horsemen.
3

4 THE COURT: I did not say that. I said being aware
5 of their own self-interest at the time they were acting. The
6 legislature cannot be presumed to be a bunch of idiots.

7 MR. MOSS: If your Honor please, racing is a
8 peculiar sport. It is not like an ordinary business where I
9 do all I can for myself and my competitor does all he can for
10 himself. They race for a pot.

11 THE COURT: I understand that, but the legislature
12 must have known all that.

13 MR. MOSS: Let us assume that they did and let us
14 assume that these people did use this to advantage themselves
15 personally.

16 THE COURT: If they deliberately used it to
17 advantage themselves and disadvantage others, then it seems
18 to me you have your case. But the mere fact that they were
19 aware of their own self-interest at the time they were acting
20 does not seem to me to be enough. The legislature must have
21 known that they were human beings and they put human beings
22 in this position.

23 MR. MOSS: I have a different theory of the case,
24 your Honor, because substantially I have stated what I
25 propose to prove: that they did advantage themselves and

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2 that necessarily, racing being a group activity, by
3 advantaging yourself, necessarily you disadvantage your
4 competitors.

5 THE COURT: If all you can prove is that they did
6 what was necessary in the situation, it does not seem to me
7 you have established your case.

8 MR. MOSS: I agree with you thoroughly. If all I
9 prove is that they did what was necessary in the situation, I
10 have no case. But if the situation was not done in that way --
11 just as the Court said, "I knew so-and-so" at one point" --
12 and if they are not prepared to put this out of their minds
13 and to run racing as the legislature trusted them with the
14 power to do in a fair manner which would not advantage them-
15 selves to the expense of their competitors, if they are not
16 prepared to do that, they have violated the law.

17 THE COURT: I presume they will say they were
18 prepared to do that, and my question is whether they succeeded.

19 The previous witness testified that neither
20 subconsciously or consciously did he advance the interests of
21 a Jockey Club member. I told him he did not have the slightest
22 idea what he was doing subconsciously unless he is a lot
23 smarter than I am, and that I won't admit. But you have got
24 to admit he did it consciously, it seems to me.

25 MR. MOSS: Not consciously in each instance. If by

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1 a course of conduct I can show statistically that these
2 people benefited continually and throughout --

3 THE COURT: All you can show is statistics
4 resulting from the subconscious --

5 MR. MOSS: Yes.

6 THE COURT: Then I don't think you have anything,
7 unless the legislature had no power to put them in this
8 position.

9 MR. MOSS: I don't want to get into subconscious,
10 but let me give you an example of what I am arguing, if your
11 Honor please. I own the only five-legged horse in the world
12 and I as a member of the board of trustees certainly write a
13 lot of races for five-legged horses. Nobody is going to be
14 able to prove that I just wanted to benefit my horse, but they
15 certainly can draw an inference from the fact that I am using
16 my position as a trustee to benefit my activities as the
17 owner of a five-legged horse.

18 THE COURT: And if you produce that, I will give
19 you summary judgment, on that issue.

20 MR. MOSS: Right. And if that is about the size
21 I have to produce, then I can predict your Honor's judgment
22 at the end of this case because I cannot produce anything as
23 obvious as that, but generically I can produce things that
24 are the same.
25

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2 THE COURT: I am not ruling now, obviously, but it
3 does seem to me that you have to prove more than statistics
4 which can be explained by subconscious reaction of people
5 that the legislature deliberately put in this position.

6 MR. MOSS: In other words, if they can be explained
7 by the subconscious desire to better yourself at the expense
8 of your competitors, you feel that if it is only subconscious
9 there is no case?

10 THE COURT: I would think so. Maybe I am wrong.

11 MR. MOSS: The fact of the matter is that the
12 legislature gave no thought to it at all.

13 THE COURT: I cannot assume the legislature gave
14 no thought to the perfectly obvious result of what it had done.

15 MR. MOSS: This may be obvious to your Honor, but
16 I want you to know that these defendants have claimed it is
17 not obvious at all in the many cases we have had.

18 THE COURT: They claim that their subconscious is
19 well within their control. I may very well doubt that. But
20 the legislature certainly knew what it was doing. I cannot
21 presume they are a bunch of idiots. Some of us may have those
22 views.

23 MR. MOSS: Whether consciously or subconsciously,
24 your Honor, these people acted in a way using the power that
25 was given to them to control these tracks, and if they acted

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2 in a way to benefit themselves as horsemen in the different
3 capacities at the expense of their competitors we say there
4 has been an antitrust violation. I know your Honor disagrees,
5 but there it is.

6 THE COURT: I may not disagree when the case is
7 over, but at this moment I do.

8 MR. MOSS: There it is.

9 BY MR. MOSS:

10 Q Mr. O'Brien, some horses race better at longer
11 distances than others, do they not?

12 A Yes.

13 Q So that whether a race was a longer distance or a
14 shorter distance would be affected by --

15 A Would be what? I did not hear that.

16 Q The result of that race would be affected by the
17 distance at which it was run?

18 A Yes.

19 Q And the same is true when you choose to have a race
20 on grass instead of dirt or vice versa, is that correct?

21 A Yes.

22 Q Can you state whether the percentage of stalls
23 occupied by members of the New York Racing Association or the
24 Jockey Club who race horses is substantially greater at
25 Saratoga than it is at Aqueduct and Belmont?

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1
2 A I would have to think so because they have the
3 better horses.

4 Q You say they have the better horses?

5 A Yes.

6 Q They have the better horses?

7 A Yes.

8 Q Has that always been true?

9 THE COURT: "Always" is a big word. Since when do
10 you mean?

11 Q Well, in the last ten years.

12 A Oh, I think they have a uniformly high standard of
13 horses.

14 Q The best horses are stake horses, are they not?

15 A They earn the most money. I assume that that --

16 THE COURT: In other words, the stake races attract
17 the best horses? That is what he means.

18 THE WITNESS: Correct. That is the biggest
19 opportunity to earn money is in the stake races.

20 THE COURT: And there would be the best horses in
21 that?

22 THE WITNESS: Right.

23 Q There is a word in use necessarily with respect to
24 a stake horse? Isn't there such a word?

25 A There is: quality.

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Q Yes, the best quality horse.

A Yes.

Q At the Saratoga meeting do you also get horses from big stables all over the United States?

A Yes. They come to Saratoga and stay with us through the fall, people from California. Our meeting in Saratoga is in August, and California racing in August goes to San Diego, to Del Mar, which is a smaller track, it is not as big as the Los Angeles track, so some of their horses, the better horses, will come East for our big races at Saratoga and the big races in the fall.

Q They come in for the big races?

A Yes, but they bring other horses with them.

Q What is that?

A They bring other horses with them.

Q Yes, but they come in for these races, you say?

A Well, that is the attraction. If they want to become champions, they usually have to run here.

Q When these people come in from all over the country, you get more stake horses, they bring those in, don't they?

A They bring a stake horse and they bring somebody with them.

THE COURT: By somebody, you mean another horse?

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2 THE WITNESS: Another horse. You know, they usually
3 don't just send one horse; they usually send a group of horses,
4 let's say half a dozen, and the stake horse would be at the
5 top of it and there might be other ones.

6 Q Do you remember these questions and answers, Mr.
7 O'Brien -- I am talking about the Saratoga meeting.

8 MR. HYDE: What page?

9 MR. MOSS: I beg your pardon, page 176.

10 Q "Question: How does it differ, quality, from the
11 Belmont and Aqueduct meetings?

12 "Answer: Get horses from all over the United States for
13 the Saratoga meeting.

14 "Question: You get more stake horses?

15 "Answer: In percentage it would have to be more stake
16 horses."

17 Are those answers correct?

18 A Correct.

19 Q Is there a substantially greater percentage of
20 stake horses run at Saratoga in comparison to the entire
21 program than is run at Belmont and Aqueduct?

22 A Yes.

23 Q About two and a half times as many stakes?

24 A We have, I think, twenty stakes at Saratoga in
25 24 days.

Q Out of 24 days?

A Right. Might be 19 or 20.

Q So you have a stake almost every day at Saratoga?

A We have a stake on 20 of 24 days.

Q Yes. And you have about two a week in the city, at Belmont or Aqueduct, isn't that correct?

A Well, our stake program runs anywhere from 95 to 100.

Q Yes.

A So you take --

Q Wasn't it Friday and --

A Mondays too, holidays.

Q Is it true that the biggest stables and the most Jockey Club members are represented at the Saratoga meeting more than at any other meeting in the United States?

A I would have to guess so.

THE COURT: You would guess so?

THE WITNESS: I would guess so, again because of the quality of their horses.

Q Because of the quality, that is true; is that what you are saying?

A Yes.

Q To go back to the formation of the New York Racing Association, Mr. O'Brien, up to the time of the difficulties

2 between the HBPA and the NYRA, was there ever a member of the
3 board of trustees of the racing association who was not also
4 a member of the Jockey Club?

5 MR. HYDE: Your Honor, we not only asked this
6 question this morning, we had a stipulation in respect to it.
7 I do not see what point is served by asking it over and over
8 again.

9 MR. MOSS: I withdraw it.

10 THE COURT: I thought we stipulated these things?

11 MR. MOSS: Yes, I had forgotten that. We had.

12 May I have these marked for identification, please.

13 (Plaintiffs' Exhibits 22 and 23 were marked for
14 identification.)

15 Q I show you Exhibits 22 and 23 for identification
16 and ask you if you can tell us what those are.

17 A They are condition books.

18 Q For what periods, respectively, if you don't mind?

19 A I have to look inside. 22 is the first issue,
20 eight days, Monday October 19 - Tuesday October 27, 1970.

21 23 is the second eight days, Wednesday October 28 to
22 Thursday November 5, at Aqueduct.

23 Q I call your attention to page 26 of Exhibit 22 for
24 identification, and I read to you this paragraph:

25 "In the absence of a specific contract, jockey fees where

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2 the value to the winner is \$1,300 or more shall be \$25 for a
3 losing amount, \$30 for finishing third, \$40 for finishing
4 second, and \$50 for a winning mount."

5 Is that correct?

6 A Yes.

7 Q Now I show you page 26 of Exhibit 23 for
8 identification, and I ask you to read the first full paragraph
9 on that page.

10 A "In the absence of a specific contract, jockey fees
11 shall be \$35 for a losing mount, \$45 for finishing third, \$55
12 for finishing second, and for a winning mount 10 percent of
13 the winner's share of the purse."

14 Q That is different from what you had had previously,
15 is that correct?

16 THE COURT: That is correct.

17 A That is correct.

18 Q How did that change come about, Mr. O'Brien?

19 A The jockeys, through their guild, wanted an
20 increase in riding fees, because the horsemen had received an
21 increase in purses. Economics.

22 Q Right. Well, their wanting it did not make it
23 happen. What made it happen, Mr. O'Brien?

24 A There were discussions. I seem to remember the
25 starting of it at Saratoga, the guild had forced a change in

2 fees in different parts of the country, and they came up to
3 Saratoga and suggested that New York should fall in line and
4 grant them additional fees. There were quite a few meetings
5 at Saratoga, there is a round table where things like this are
6 discussed, there were separate meetings. And I think they
7 just kind of planted the seed in Saratoga. And when we got
8 back home at Aqueduct they made it a little stronger,
9 sharper, discussed it with the horsemen, we discussed it with
10 the horsemen, and I think that --

11 THE COURT: What do you mean by horsemen?

12 THE WITNESS: Horsemen: owners and trainers, and
13 horsemen's groups. There is an American Trainers Association
14 which represents some of the trainers, there is the HBPA,
15 there is Thoroughbred Owners and Breeders Association. I
16 think it was discussed with all factions of racing. And I
17 think the conclusion was obvious that with the increased
18 purses and with the fact that the jockeys were getting
19 additional money in other parts of the country, that the
20 wisest thing to do businesswise was to grant them an increase.
21 And we figured this manner in doing it because it was
22 customary, even though there was no written rule, to give
23 the jockey the equivalent of 10 percent of the purse if he
24 wanted it.

25 I would say that anybody who didn't do it was the

2 exception, and also he didn't get the top jockey the next
3 time. If you didn't want to pay it, you wound up with a
4 lesser grade jockey, somebody who would accept whatever the
5 winning fee was and not 10 percent of the purse.

6 THE COURT: You mean under the old rules that you
7 read the first time, where there was not anything about
8 10 percent --

9 THE WITNESS: It was still paid.

10 THE COURT: It was still paid.

11 THE WITNESS: Definitely.

12 Q Mr. O'Brien, you used the word "we" did thus and
13 such. Who is "we"?

14 A NYRA.

15 Q Do you have any poll, any letter, any agreement,
16 any indication, that the horsemen in any way participated in
17 this decision made between the N.Y.R.A. and the Jockeys Guild?

18 A Only discussion is all I can say. It was well
19 talked over.

20 Q It was your decision ultimately, though, was it
21 not?

22 A Mine?

23 Q NYRA.

24 A We printed it in the condition book.

25 Q Did it get in there by accident or did it get in

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there as a result of a decision you made?

A We put it in there to tell the people what we were going to do.

Q What horsemen do you say were in on some of these discussions? Name some.

A Well, Elliott Burch was the, I think, Vice-President of the American Trainers Association; John Gaver was on the board of directors of the American Trainers Association; Johnny Narud was -- I don't know if he was on the board of the HBPA, but he was certainly a representative of theirs.

Q In what capacity did he represent the HBPA?

A Vocally.

Q He was against the HBPA, was he not, in all of these disputes, he was very anti-HBPA, was he not?

A Mr. Narud has been anti everything, plus everything, at different stages of his life.

Q Right. He never was talking for the HBPA, was he?

A He was just a vocal person.

Q And because he was vocal you decided he would be a representative of the HBPA?

A No. I believe he is a member of the HBPA.

Q Is he? Is he a representative in any way, assuming for the moment that he might have been a member?

A I can't say. I really don't know.

Q But you did say it, you were willing to say it, weren't you?

A I know he represented the HBPA.

Q In what capacity, where, how did he represent them?

THE COURT: He said he represented the HBPA; is that what you say?

THE WITNESS: I don't know if actually he said, "I am here to represent the HBPA," no. But let me say I assumed he was.

Q At that time there was trouble between the trustees and the HBPA, was there not?

THE COURT: You said between the trustees?

Q Between the NYRA and the HBPA. There were lawsuits and there disputes and there were racing stoppages and all the rest of it, were there not?

A In 1970?

Q Yes. But through there. Well, weren't there?

A I am trying to think whether there were any racing stoppages in 1970.

Q The stoppage was in 1969 and there were lawsuits filed and this is one of them, isn't that so?

A Yes. And this is the fall of 1970.

Q Right. So that during this period of time --

THE COURT: This lawsuit was pending, I take

2 judicial notice of that.

3 MR. MOSS: Right. I am trying to get the witness
4 to say yes.

5 THE COURT: What is the significance? I cannot
6 follow this.

7 Q What was the name of the last man, Narud? Is that
8 the man we were talking about? He trained for a trustee,
9 didn't he?

10 A Trustee? No.

11 Q Jockey Club member?

12 A Mr. McKnight belongs to the Jockey Club.

13 Q So this man who you say spoke as a representative
14 of the HBPA was a trainer for one of the Jockey Club members;
15 right?

16 A That is correct.

17 Q Yet you consider that when he went along with this
18 thing, assuming he did, that somehow or other the HBPA was
19 going along with this?

20 A I don't think anybody considered anything other
21 than the fact that it was an economic move on the jockeys'
22 part to increase their income.

23 Q Which you recognized?

24 A Which I think everybody recognized.

25 Q And you acted upon.

THE COURT: You printed it?

THE WITNESS: We printed it in the condition book.

THE COURT: How does this get to be an antitrust violation?

MR. MOSS: If there is an agreement between the NYRA and the Jockeys Guild by which they agree that they are going to act together to force the horsemen to pay higher fees to the jockeys, that is a clear violation of the anti-trust laws. They have the muscle to do it, to put it into the condition book, the Jockeys Guild requested it. There is an agreement between these two organizations to impose higher fees upon a third group: a clear violation of the antitrust laws.

THE COURT: How are you going to settle the strike any other way?

MR. MOSS: What strike?

THE COURT: Quite obviously, if ~~there~~ had not been an agreement there might have been a strike.

MR. MOSS: The fact that it might have been an expedient thing to do is not the thing we are talking about at the moment, if your Honor please.

MR. HYDE: Your Honor, in addition to the observations you have made, I think there is another reason why this whole line of testimony should be stricken here.

2 The two named plaintiffs, Mr. Jacobson and Mr. Karlinsky, did
3 not engage in racing in New York at the time this change took
4 place in the fall of 1970. The HBPA, the remaining
5 plaintiff, of course, never raced horses, never paid any
6 Jockeys Guild's fees. We don't have any testimony that any
7 of the three plaintiffs who are in this lawsuit were in any
8 way affected by this increase in jockeys' fees.

9 MR. MOSS: That is not exactly so, and there are
10 two reasons for it. Mr. Karlinsky, it is true, did not race
11 here for a time. He is back in racing again. So he is and
12 will be affected by this.

13 The thing about Mr. Jacobson -- I don't know whether
14 to laugh or weep at --

15 THE COURT: Try a little of each.

16 MR. MOSS: -- they kicked him out of racing in New
17 York and then say, "Why, he hasn't been injured by this. Why,
18 he doesn't race here any more."

19 MR. HYDE: Your Honor, we have a stipulation on the
20 record here that that is out of this case. Mr. Jacobson had
21 his day in court in Mineola, Long Island, two weeks ago, and
22 the jury found against him. They returned a verdict in our
23 favor.

24 MR. MOSS: Not on this.

25 MR. HYDE: On this very point.

MR. MOSS: Not on this.

MR. HYDE: He was denied stall space in 1970 for good and sufficient reasons, based upon his finding by the New York State Racing Commission, by the Maryland State Racing Commission, of fraudulent activities. He stipulated that his denial of stall space and his getting out of racing at that time was not a part of his case. We moved to stay that Mineola case in favor of this case. He said that is a different case, it is entirely different. He went to the jury, he had his day at bat, he struck out, and I object to any effort to inject that issue into this case.

MR. MOSS: The only thing decided there was whether or not they had sufficient cause to exclude him, and they used the finding of the racing commission -- and this is being appealed, incidentally -- to say that even though the racing commission said that he should be excluded from nearly 45 days, that they had the right to take the racing commission finding and to alter it to exclude him permanently.

MR. HYDE: I will read the record in that event, your Honor. This is taken from Mr. Jacobson's deposition. He was asked this question, page 11:

"Question: You are not seeking any damages in this lawsuit" -- this is the Karlinsky lawsuit -- "by reason of the fact that you are no longer a horse owner and trainer as of

December 1970." There is a colloquy among counsel. Then Mrs. Caplan, Mr. Moss' associate, said:

"No, we are saying there was favoritism in allotting stall space while he was active in the industry, caused him to suffer damages." And we said, "You are not seeking damages in this case by reason of Mr. Jacobson's failure to seek stall space in 1970; is that what you are saying?"

"Mrs. Caplan: That's right. That is the other lawsuit."

That is the lawsuit that went to the jury and where Mr. Jacobson lost.

MR. MOSS: If your Honor pleases, we are not claiming damages for that.

MR. HYDE: Then what are we doing --

MR. MOSS: We are saying we claim damages in the other lawsuit because of a wrongful exclusion of Jacobson, so called. The fact of the matter is that they did exclude him, and after they excluded him they say he did not suffer because he was not racing here. That is all I am saying.

MR. HYDE: The jury found that we had sufficient cause to exclude him, that our exclusion was in the best interests of racing. That was the issue that the jury had submitted to it.

2 MR. MOSS: It was not, but --

3 MR. HYDE: I can produce the judge's charge.

4 MR. MOSS: It was not, but let us assume it. The
5 fact is that they excluded him.

6 THE COURT: If they excluded him properly, then he
7 could not suffer any damage from what happened after he was
8 excluded.

9 MR. HYDE: Right.

10 THE COURT: But you say you are appealing it.

11 MR. MOSS: That is on appeal. But that is not the
12 point. As far as the fact the jury found for the time being
13 that they had a right to exclude him and that was based on the
14 judge's charge, that they had a right to second-guess, to
15 review the findings of the racing commission and extend the
16 penalties of the racing commission, to that extent we are
17 appealing. The fact that they found against Jacobson on the
18 basis they said what he did before the racing commission, the
19 things that came out were so terrible that he had no right to
20 race in New York, that the jury did find. The question was
21 whether that was properly before the jury.

22 MR. HYDE: Your Honor, there are two points here.
23 We had the stipulation of counsel on the record at the
24 deposition stage of this case that that was a different law-
25 suit, that they were making no claim for damages here based

2 on denial of stall space in 1970 and his getting out of
3 racing thereafter.

4 MR. MOSS: In any event --

5 MR. HYDE: Secondly, regardless of whether an
6 appeal is being taken, and all we have now is the notice of
7 appeal, the fact is that there is a doctrine of collateral
8 estoppel which could be invoked here, but I say need not be
9 in view of the stipulation of counsel that that was a different
10 case.

11 MR. MOSS: In any event, this is irrelevant to it,
12 to the extent to which we are now trying a lawsuit which
13 alleges a certain amount of continuing acts on the part of
14 the NYRA. We show that these acts are continuing.

15 Let me assume just for the sake of this argument
16 that this agreement with the Jockeys Guild was an antitrust
17 violation. We have three defendants in this lawsuit, one of
18 them temporarily suspended from racing but most certainly he
19 is back in racing now.

20 THE COURT: You mean three plaintiffs?

21 MR. MOSS: Three plaintiffs, of course. One of
22 them is back in racing now after a short suspension of his
23 activities, of his racing activities. He disposed of his
24 stable and changed his mind, and he is back in racing again.
25 He certainly will be affected by this in the future.

As of now, the HBPA is still a party to this case. The HBPA has an interest in this thing and the activities of these people and their continuing activities. To rule this out at this point and not to --

THE COURT: I am not ruling it out at this point, but I wish, just for my education, you would tell me what you thought they ought to have done in this situation.

MR. MOSS: I think that unless the horsemen -- and I think that the facts will show eventually in this trial that the predominant organization representing about 90 percent of the horsemen was the HBPA -- they could have gone to the horsemen, they could have discussed it with them, pressured it with them. But can a company, for example, make a deal with the union to do something which affects the rights, the prices, the price structure, of many, many other people, do anything you want, because the union says if you don't do this thing, if you don't enter into this antitrust conspiracy with us, we are going to strike? Let us assume they say that. I don't know of any defense --

THE COURT: Every time you have a strike you settle it on that basis.

MR. MOSS: You settle it -- no, no -- I see what your Honor is raising now, if I may say. If I am a company, and a union threatens me with a strike, I settle it by giving

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2 them what they want perhaps.

3 THE COURT: Or something like it.

4 MR. MOSS: Right. But I cannot settle a union's
5 claim against you without even consulting you. Because this
6 money does not come from the NYRA. The NYRA was deciding with
7 the Jockeys Guild how much the horsemen should give the
8 jockeys.

9 THE COURT: I understand that. As you pointed out
10 earlier, this is kind of a sui generis operation. In this
11 sui generis operation how do you contend that the defendant
12 should have acted? I take it they were threatened with the
13 possibility of a strike.

14 Is that what you are telling me?

15 THE WITNESS: Correct.

16 THE COURT: How do you think they should have acted?

17 THE WITNESS: They should have said to the Jockeys
18 Guild, "You can refuse to ride for any horsemen who won't
19 agree to this, your claim as against the horsemen. You go to
20 the horsemen's organization and say, 'Any horsemen who doesn't
21 agree to pay the jockeys thus and thus, he is not going to get
22 a jockey to ride his horse for him.'"

23 THE COURT: Why didn't you say that?

24 THE WITNESS: I think that was really in effect.

25 I think all the guild really wanted was to have it in the

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condition book. I think the -- what we put in the condition book was the standard operating procedure at the time.

THE COURT: Back in the condition book, suppose some horseman wanted to make a different deal with the jockey. Could he have?

THE WITNESS: It says that this goes unless there is a specific contract.

MR. MOSS: There are occasional contracts of that nature, your Honor.

THE COURT: So if the members of the HBPA said to the jockeys, "We won't abide by that, you can't ride any of our horses unless you give us a different deal," they could have said that?

THE WITNESS: Surely.

THE COURT: And you would not have interfered with that?

THE WITNESS: Well, we want to continue racing.

THE COURT: Suppose after you got that in your condition book the HBPA issued a public statement that they --

THE WITNESS: They are not going to do it.

THE COURT: -- are not going to do it. Any jockey who wants to ride one of their horses has got to have the following contract. What would you have done under that circumstance?

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THE WITNESS: We would have tried to settle
somewhere between the middle, I guess.

THE COURT: You, I take it, could not make a HBPA
horse owner sign that contract?

THE WITNESS: Well, actually it never came up, so
I can't say, you know, what we would have done. But just
looking at it in hindsight, if the HBPA acting as a group said
to NYRA or to the guild, "I am not going to do that," I think
they would have had to go on strike.

THE COURT: The guild would have had?

THE WITNESS: No, the horsemen.

BY MR. MOSS:

Q Is it not a fact, if you know, that that is
exactly what the HBPA said to the Jockeys Guild, "that we
don't want to agree with you on this, that we are going to
resist you"?

A Well, they were paying it then.

Q I mean before the change?

A They were paying the 10 percent then. It just
wasn't in writing.

Q Wasn't there an actual meeting at which Nick Jemas,
the head of the Jockeys Guild, was turned down by the HBPA,
who said they would not consent to this?

A I don't know.

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Q The Racing Secretary assigns stalls, does he not?

A Yes.

Q Does he also write the conditions for races?

A Correct.

Q Those conditions normally decide which horses are going to race against each other?

A Correct.

Q He also handicaps horses, is that correct?

A If he is the handicapper.

Q Isn't the Racing Secretary normally the handicapper?

A Normally, yes.

Q If he is the handicapper, he handicaps horses?

A He assigns weights to horses in a handicap race.

Q In his own judgment as to how much weight each horse should carry; isn't that correct?

A Correct.

Q All horses?

A Correct.

Q Are there differences of opinion with trainers and owners as to whether or not their horses have been properly put into races or handicapped properly?

A There is always talk.

Q Does the Racing Secretary normally get what I think you once described as a constant stream of that?

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A I think there are people in the racing world who like to voice their opinion on any subject that comes to mind.

Q Among the subjects on which people in the world like to voice their opinion, would you say that trainers and owners frequently complain to the Racing Secretary about the way he has put their horses into races or not and the way he has handicapped them?

A Very much so.

Q Tommy Trotter was replaced as Racing Secretary of the New York Racing Association, was he not?

A Yes, he was.

Q Did that occur in approximately November of 1971?

A I have forgotten the exact date, really.

Q Were you told that one day by a Mr. Vanderbilt?

A Yes.

Q He told you that the board had decided to let Trotter go?

A That's correct.

Q He said to you, "Now I've got to tell Trotter"?

A That's correct.

Q Shortly thereafter and while Trotter was still secretary, did you have a conversation with Trotter about that?

A I am sure I talked to him. Tommy is a very good

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2 friend of mine.

3 Q Did Trotter indicate to you that his being let go
4 came as a surprise to him?

5 MR. HYDE: Your Honor, I object to this line of
6 testimony. I see no relevance.

7 MR. MOSS: This will be connected.

8 THE COURT: I assume he is going to argue that
9 Trotter was thrown out because he was not favoring the Jockey
10 Club people.

11 MR. MOSS: That he did not take Vanderbilt's
12 instructions and, furthermore, that there was a specific
13 incident involving stalls which came shortly before this.

14 THE COURT: I will allow the question.

15 Q Did he express surprise, did it come as a surprise
16 to him?

17 A Oh, I think he was surprised, sure.

18 Q Did he tell you that?

19 A I am sure he expressed surprise. I might have
20 disagreed with him, though.

21 Q As to whether or not he was surprised?

22 A Yes.

23 THE COURT: As to whether he should have been
24 surprised.

25 THE WITNESS: Yes.

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2 MR. MOSS: May we have a brief recess.

3 THE COURT: Yes.

4 (Recess.)

5 MR. MOSS: Your Honor, Mr. Chadwick, who kindly
6 consented to appear here, would like to ask a question that he
7 is more capable of asking than I, just one question.

8 THE COURT: Surely.

9 MR. CHADWICK: Your Honor, it will amount to a little
10 more than one question, because I will have to lead up to it.

11 THE COURT: All right.

12 BY MR. CHADWICK:

13 Q Mr. O'Brien, in response to questions from Mr. Hyde,
14 I believe you testified --

15 MR. HYDE: I did not ask any questions.

16 THE COURT: Mr. Hyde has not asked him any questions
17 yet.

18 MR. CHADWICK: I beg your pardon.

19 Q I believe you testified that you had developed a
20 scale of payment for various classes of races to be applied
21 throughout the year, is that correct?

22 A Yes, sir.

23 Q And that you applied the same scale no matter when
24 those races were scheduled, whether at Aqueduct --

25 A That was the attempt, that was the attempt.

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2 Q You mentioned, I believe, 2-year-old maiden races
3 and 2-year-olds that had won one race as instances.

4 A Right.

5 Q Do you recall the figures that you applied besides
6 those?

7 A Yes. The ones I used this morning?

8 Q Yes.

9 A Yes, I used \$8,000 and \$10,000.

10 Q Were those intended to be actual figures or just --

11 A I was trying to show the difference.

12 Q In other words, you did not intend that those \$8,000
13 and \$10,000 were actual factual figures.

14 A No.

15 Q Was the intent of the Racing Secretary in working
16 out his overnight and his stakes program to aim at an equal
17 chance at the money throughout the entire year?

18 A The intent of the Racing Secretary is to provide the
19 best possible racing over a 42- or 44-week period, depending
20 on what year you are talking of.

21 Q Did you testify earlier that the attempt in the
22 Racing Secretary's office was to make sure everybody has an
23 equal chance at the money throughout the entire year?

24 A Yes. By that I mean, a horse of a certain level --
25 pick any level you want -- that he should be running

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2 consistently through the year for, you know, a pot that is
3 about the same. That is the intent. A \$125,000 horse should
4 run for the same amount of money throughout the year.

5 Q Do you think there is any merit to the contention
6 that the racing programs should be of approximately equal value
7 throughout the year?

8 A The racing programs?

9 Q Yes.

10 A You mean a day's card?

11 Q Yes.

12 A I don't think that that is the intent, because you
13 have different times a year when you have better horses, and I
14 think you probably are going to see peaks and valleys in that.
15 I don't think you are going to say, you take all your overnight
16 money, and say divide it by the number of racing days, and say
17 that is what we are going to have.

18 Q Would the amount of handle generated by races be
19 a factor in determining how much you ought to distribute on a
20 particular day?

21 A No. It is the total.

22 Q Total what?

23 A Handle for the year.

24 THE COURT: I think he meant: Suppose you anticipate
25 a big handle on the Fourth of July --

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THE WITNESS: Right.

THE COURT: Would you allocate big horses on the Fourth of July?

THE WITNESS: Certainly. Because people bet more money on good horses.

THE COURT: Isn't that what you meant?

THE WITNESS: Yes, sir.

THE COURT: The answer is yes to the question.

Q To continue that a little further and to enlarge on just the Fourth of July: If programs during the first week in April generate an average handle of, let us just say, \$2,000,000 a day, would it be equitable to award purses to the horses racing at that time, based on the generation of that average handle?

MR. HYDE: Your Honor, I object to the form of the question. What is equitable and what is not? I don't think that is the issue here.

MR. CHADWICK: I am taking the witness' own statement that they were attempting to make sure that everybody had an equal chance at the money throughout the entire year. I can find no more equitable method of doing it than saying, "If you generate this much interest among bettors and create this much handle, that therefore you should be paid purses commensurate with what you have attracted to the betting

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2 window."

3 MR. HYDE: I think this line of questioning is
4 argumentative. I have no objection to ascertaining what the
5 facts are if he will cast questions to elicit facts.

6 THE COURT: \$2,000,000 in April, is that a
7 reasonable handle?

8 THE WITNESS: It's a reasonable handle, but we
9 really do it on the whole year and project what the total
10 handle is going to be. And then, with that projection in
11 mind, the Racing Secretary will allocate his money that he has
12 in a fashion so that a type of horse, the specific classifica-
13 tion of horse, will receive the same purse throughout the year,
14 no matter what day he runs on. Horses are graded according to
15 their value.

16 THE COURT: Wouldn't he get a bigger purse if he
17 won on the Fourth of July when there is a bigger handle than
18 if he won on some other day?

19 THE WITNESS: No, sir; no, sir.

20 THE COURT: He would not.

21 THE WITNESS: No, sir.

22 Q And the effect of your grading horses and the
23 purses is that from time to time you take away from the horses
24 that create an interest in racing in March or April and award
25 it to the horses that are running in August? Isn't that the

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2 way it sometimes works out.

3 A You can look at it any way you want to. The
4 object is to supply 44 weeks of continuous good racing, the
5 best that we can offer. It is our judgment that the best way
6 to do this is to provide a classification horse with the same
7 purse throughout 44 weeks.

8 Q Then during four of those weeks you simply schedule
9 more of the expensive type of race such as stakes race, and
10 therefore pay out a much larger percentage of the mutuel handle
11 to the horses racing in that four-week period. Isn't that a
12 fact?

13 A We pay the same purse for the same type horse at
14 Aqueduct, Belmont, and Saratoga.

15 Q And you schedule many more stakes races so that you
16 pay out a much larger percentage of the pari-mutuel handle at
17 Saratoga. Isn't that the way it works out in practice?

18 A It does, because the handle is less.

19 MR. CHADWICK: Thank you. That is all I wanted to
20 know.

21 MR. MOSS: I have no other questions, your Honor.

22 CROSS-EXAMINATION

23 BY MR. HYDE:

24 Q Mr. O'Brien, were you employed at one time by the
25 Saratoga Racing Association, if I have the name correct?

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2 A Yes, prior to NYRA.

3 Q Yes, the corporation which owned and operated
4 Saratoga prior to the formation of the New York Racing
5 Association?

6 A Yes, I worked for them from 1947 on.

7 Q In those days did Saratoga have a large number of
8 stake races?

9 A Yes. Sometimes two a day.

10 Q Did it have many if not most of the stake races
11 which are now held there by the New York Racing Association?

12 A Yes.

13 Q And many of these stake races go back into the
14 19th century, do they not?

15 A They do.

16 Q Are they run at the same distance as they used to
17 be run?

18 A The Hopeful has been six and a half furlongs since
19 1901.

20 Q There are others that have stayed the same for
21 years and years?

22 A The Travers has been a mile and a quarter since
23 1863, I guess.

24 Q No changes have been made since the NYRA took over
25 those races?

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1 A In the Travers, no.

2 Q And other stake races?

3 A No.

4 THE COURT: How many changes have been made at
5 distances?

6 THE WITNESS: I used the word earlier "minimal."
7 But I just can't think of too many changes. We did switch
8 some races to the grass when we got a second grass course, just
9 to take advantage of it. Our overall program is one to provide
10 more races that start in front of the stand for the benefit of
11 the customer. We think if he sees the action he is apt to bet
12 more on it. So you would conform to your track size. For a
13 portion of the time, when Belmont Park was being built --
14 Belmont is a mile and a half in circumference; Aqueduct is
15 nine furlongs, a mile and an eighth in circumference. So to
16 start in front of the stands at the two places are entirely
17 two different distances. When Belmont Park was being built we
18 raced the entire downstate schedule at Aqueduct. So we
19 naturally had to conform to the size of the track the races
20 that had been run over a mile and a half track are now being
21 run over a mile and an eighth. You can't start horses on a
22 turn -- we shouldn't, I should say. We did start the Belmont
23 on the turn because we didn't want to change the mile and a
24 half. But those changes were predicated by, you know, a
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2 difference in physical layout of the course that was being run
3 on.

4 Q When the Saratoga track was being operated prior to
5 1955 by the old Saratoga Racing Association, did that
6 association's revenues come entirely from its operations
7 upstate in Saratoga Springs?

8 A No. The racing commission granted them two weeks
9 at Jamaica to generate additional moneys, so that the Saratoga
10 program would fit into the general overall program of
11 New York racing.

12 THE COURT: In other words, the Saratoga
13 Association at the Saratoga track came down and raced for two
14 weeks --

15 THE WITNESS: They leased the metropolitan track
16 for two weeks where there were larger crowds, bigger handles,
17 and in that way generated sufficient income not only to pay
18 the purses during that two-week meeting but to assist in
19 paying the purses for the upstate meeting.

20 Q Mr. O'Brien, there has been testimony elicited with
21 respect to the fact that some horses race better at long
22 distances and some horses do better at short distances. Is
23 that correct?

24 A That is true.

25 Q Is there any correlation, to your knowledge, between

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the distance that a horse runs best and the ownership of such horses by members of the Jockey Club or trustees of the New York Racing Association?

A Certainly none that I know of. Some horses run long, some horses run short.

Q To your knowledge do members of the Jockey Club, trustees of the NYRA, have a disproportionate share of the long-distance runners or the short-distance runners or any distance runners?

A Not to my knowledge.

Q When it comes to whether or not the horse does better on the turf or on the dirt, I think you testified that some do do better on the turf than they do on the dirt; is that correct?

A That's correct.

Q Again, is there any correlation, to your knowledge, between the fact that a horse does better on one surface or the other and the ownership of such horses by members of the Jockey Club or trustees of the New York Racing Association?

A Not to my knowledge.

Q How often is the stake program reviewed by the trustees of the New York Racing Association?

A Each year, once.

Q What time of year?

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2 A When we are not racing.

3 Q Is the entire program for the forthcoming year
4 drawn up and submitted for review to the trustees of the
5 racing association?

6 A The entire stakes program?

7 Q For the entire year.

8 A Right.

9 Q For each meeting from start to finish.

10 A Right. The whole 44 weeks.

11 Q When it comes to particular overnight races, when
12 are they drawn up?

13 A Condition book intervals. That condition book
14 happened to be eight days. They are ten days now. Sometimes
15 they are twelve days.

16 THE COURT: You say that condition book. That is
17 one of the ones --

18 THE WITNESS: That is the one, the exhibit was an
19 eight-day condition book. And that probably was a 24-day
20 meeting, and the Racing Secretary had three eight-day
21 condition books.

22 Q Those I think you testified are not submitted to
23 the trustees of the racing association?

24 A No, because condition races change every day as
25 different horses win different amounts of money.

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O'Brien - cross - redirect

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Q Are there sometimes last-minute substitutions of races?

A Yes.

Q If a particular race does not draw enough entries, a new race is drawn up and substituted?

A Usually the overnight carries a substitute or two substitute races, in case a race in the condition book does not fill.

MR. HYDE: I have no further questions.

REDIRECT EXAMINATION

BY MR. MOSS:

Q The reason they are not concerned with the overnights is not that they change from time to time; is not the reason a lack of interest in the overnights on their part?

A I wouldn't think so.

Q Do you remember this question and this answer:

"The Court: So if I understand the import of the last question and answer, the trustees of the New York Racing Association concern themselves essentially with the stakes races; is that correct?

"The Witness: That's the only --

"The Court: The only races.

"The Witness: Yes.

"The Court: And the overnight program is not a

1 wctb O'Brien - redirect 193

2 matter with which they concern themselves.

3 "The Witness: That is correct."

4 Then you went on to discuss the stakes program.

5 Are those correct answers?

6 A That is correct.

7 Q You say that in the old days the Saratoga race track
8 used to lease Jamaica for two weeks, is that correct?

9 A That is correct.

10 Q They were both private tracks at that time, is that
11 correct?

12 A Correct.

13 Q It is not unusual for a private track which has
14 additional racing dates to lease another track for that
15 purpose; that is not unusual, is it?

16 A No.

17 Q Did the Saratoga Racing Association take its combined
18 operation at Jamaica and Saratoga, keep the purses paid within
19 the amount it retained from the handle? It was not losing
20 money, was it?

21 A The Saratoga Association?

22 Q Yes.

23 A I can't say.

24 Q In other words, the purses paid when compared to the
25 overall handle which you like to talk about of the two tracks

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at which they raced, the purses paid bore a certain reasonable percentage, did they not, to the handle which they took in; the purses which they paid never exceeded their retention of the handle, did it?

A It came pretty close to it.

Q Did it ever exceed it?

A I don't know.

Q They could not have stayed in business if it did, could it?

A It's the record.

Q They could not have stayed in business, could they, Mr. O'Brien? In other words, if a track paid out more in purses than its retention of the handle, it could not stay in business, could it?

A I assume the reason that they applied to the racing commission for downstate dates meant that they could not support themselves.

Q It meant that they could increase their profits, did it not?

A It meant that they could not support the meeting at Saratoga.

Q Is that the reason which they gave?

A I have no idea.

Q Of course you don't. Now let me ask you another

1 possible reason why they may have done it, and that is in
2 addition to their profit, if they do lease another track and
3 have more racing days they would be glad to do it because they
4 made more money on it --

5
6 THE COURT: If he does not know, why speculate
7 about it?

8 MR. MOSS: But he testified at great length about
9 the reason for all this, if your Honor please, and now it turns
10 out he does not know. He said the reason. He gave a detailed
11 reason for it all.

12 THE COURT: He said he assumed it was the reason.
13 This is all, I assume, public record.

14 They had to get permission from the commission?

15 THE WITNESS: Definitely.

16 THE COURT: I assume it is a public record.

17 MR. MOSS: Yes, and they do, as the witness
18 testified, lease it, and then --

19 THE COURT: If the issue of why they did is
20 important, why get this witness to speculate? They made a
21 petition to the commission and they stated their reason.

22 MR. MOSS: If your Honor please, he was put on the
23 witness stand, and the defendant asked this just now, and I
24 am merely pursuing it on redirect.

25 THE COURT: You develop that he does not know the

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reason.

MR. MOSS: Exactly.

BY MR. MOSS:

Q Was the only reason for the changes in distances occasionally the fact that you changed tracks or that you wanted to put them in front of the grandstands?

A I can't think of a specific instance where it wasn't.

Q Isn't there a school of thought amongst some racing people who like longer distances, they think it is better for racing and it is better generally, they like it better?

A Well, we have longer distances than other places in the country.

Q Let me ask you more specifically whether Mr. Vanderbilt does not think that races should be longer and has so expressed himself to you and other people connected with racing.

A One of the reasons Mr. Vanderbilt likes longer races is that generally longer races start in front of the stands.

THE COURT: Why is that?

MR. MOSS: That is what I was going to ask.

THE WITNESS: Well, if you have a mile and a half race track and you run a mile and a quarter race, it starts down from the finish line.

2 THE COURT: It has got to end in front of the
3 stands.

4 THE WITNESS: Correct. But if you start and
5 finish in front of the stand, which would be a mile and a
6 half race, Mr. Vanderbilt feels that it is a better race and
7 we feel that it is better business.

8 Q So you would say that the longer racing would
9 depend on which race track you were racing at; is that right?

10 A If you wanted to start in front of the stand, yes.

11 Q In other words, you would change a race, a stake
12 race, from one track to another, depending on which track was
13 being raced at, you would change the distance at that race.

14 A We did it.

15 Q Is that what you customarily do, Mr. O'Brien?

16 A We don't customarily move one race from one track
17 to another.

18 Q But you sometimes change from Aqueduct to Belmont
19 and vice versa?

20 A Well, we are forced into that position by the
21 closing of Belmont Park.

22 Q And when you are, you change the distance of the
23 race?

24 A Correct.

25 Q That is the only reason?

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2 A We didn't change them all.

3 Q You didn't change some. Why did you change some
4 and not others?

5 A Because some are traditional races.

6 Q In other words, sometimes you change a race because
7 it should start and finish in front of a track and other times
8 you have other reasons?

9 A That is correct.

10 Q Was one of the disagreements between Mr. Trotter
11 and Mr. Vanderbilt the fact that Mr. Trotter did not go for
12 these longer distance races?

13 A I don't know.

14 Q Did Mr. Vanderbilt ever say that to you?

15 A Say that to me?

16 Q Yes.

17 A No.

18 Q Did Mr. Trotter ever discuss that with you?

19 A No.

20 Q And you are not aware of any differences between
21 Mr. Vanderbilt and Mr. Trotter?

22 A Surely.

23 Q What were they?

24 A Differences of opinion, that's all.

25 Q Of course they were differences of opinion.

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2 THE COURT: On what subjects, he wants to know.

3 THE WITNESS: Oh, Mr. Vanderbilt discusses a great
4 many subjects.5 THE COURT: What was the cause of his being fired
6 so far as you know?7 THE WITNESS: I guess the real reason is that Mr.
8 Vanderbilt felt he was not providing the ultimate product, you
9 know, that the finished product was not what the horses on the
10 grounds could provide.11 THE COURT: Wasn't providing as good races as could
12 be provided?

13 THE WITNESS: Right.

14 THE COURT: That is your opinion of Mr. Vanderbilt's
15 opinion?

16 THE WITNESS: Right.

17 THE COURT: I take it Mr. Trotter had different
18 views on that?

19 THE WITNESS: Yes.

20 Q You said there were lots of differences, is that
21 correct?

22 THE COURT: Lots of what?

23 MR. MOSS: Differences.

24 THE COURT: Differences of opinion between them.

25 A Yes.

1 wctb

O'Brien - redirect

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2 Q We all understand, trying to take this as a
3 preliminary, we all think that racing ought to be the best
4 possible racing. So there cannot, in my opinion, if you
5 follow me, Mr. O'Brien, be any argument about that. What
6 were the specific differences about how to accomplish that
7 object, which I am sure both Mr. Vanderbilt and Mr. Trotter
8 wanted?

9 A I think the specifics were the finished product,
10 the total.

11 THE COURT: His point is that both Mr. Trotter and
12 Mr. Vanderbilt agreed that they ought to have the best
13 finished product possible.

14 THE WITNESS: Well, the differences were how to
15 achieve it.

16 THE COURT: What specific areas of differences
17 about how to achieve it do you remember that the two men had?

18 THE WITNESS: Specifics? I couldn't give you any.

19 THE COURT: You can't remember.

20 Q You were Director of Operations during a good part
21 of this time?

22 A That's correct.

23 Q Does that entail being in on these meetings, stall
24 committee meetings, other meetings discussing racing; is that
25 correct?

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2 A When I was on the stall committee I met with the
3 stall committee. When I was just Director of Racing Operations,
4 I did not meet with the stall committee.

5 Q What were your functions as a Director of Racing
6 Operations?

7 A Supervision of racing officials.

8 Q You had nothing to do with the Racing Secretary?

9 A Nothing to do with the Racing Secretary's office.
10 The Racing Secretary would make the program. I would get the
11 program.

12 Q You were under Mr. Trotter, I think you testified?

13 A Yes.

14 Q Speak to him a great number of times?

15 A I would speak to him whenever I saw him.

16 Q Did you ever testify that you knew there was a
17 coolness between Mr. Vanderbilt and Mr. Trotter?

18 A Yes.

19 Q How long did that go on?

20 A A couple of months.

21 Q Did you see Mr. Trotter at least a few times a week
22 during that period of time?

23 A I am sure I must have.

24 Q Did you know Mr. Trotter outside off the course as
25 well, were you social friends?

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O'Brien - redirect

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1
2 A Yes.

3 Q Did Mr. Trotter never never mention to you as
4 Director of Racing or as a friend what the differences were
5 between him and Mr. Vanderbilt?

6 A Not specifically, no.

7 Q Well, unspecifically.

8 A He might have said something like "I'm not getting
9 along with Alfred too well," or something like that.

10 THE COURT: Did he ever tell you, "Alfred wants me
11 to do this and I don't want to do this"?

12 THE WITNESS: No. It was really general.

13 THE COURT: He never asked your advice, the
14 rightness or wrongness of these disputes?

15 THE WITNESS: Tommy was -- he pretty much kept his
16 own counsel.

17 THE COURT: Tommy being?

18 THE WITNESS: Trotter.

19 THE COURT: Trotter.

20 BY MR. MOSS:

21 Q Did you testify that after these months and months
22 during which he told you, "I am not getting along with Alfred,"
23 did you testify previously that you said that his replacement
24 came as a surprise to him, that he told you this?

25 A I believe I did.

1
2 MR. MOSS: I have no other questions.

3 THE COURT: Any recross?

4 MR. HYDE: No, no further questions.

5 MR. MOSS: No further questions.

6 (Witness excused.)

7 MR. MOSS: Your Honor, at this time -- and I am
8 aware of your Honor's feeling about the boring nature of these
9 things -- I would like to read a short excerpt from the
10 examination of one of the defendants, John A. Morris, who is
11 a trustee of the New York Racing Association and was at the
12 relevant times. I will put the rest of it in later, but at
13 this time I think it is relevant.

14 THE COURT: That is a deposition in this case?

15 MR. MOSS: That is right, sir.

16 MR. HYDE: Can we have the pages?

17 MR. MOSS: I am looking for them now. I will give
18 them to you in a minute.

19 Page 9.

20 THE COURT: What is the date of the deposition?

21 MR. MOSS: The date of the deposition?

22 THE COURT: Yes.

23 MR. MOSS: January 7, 1972.

24 "Question: Are there any discussions about the
25 nature of the racing program" -- we are talking about meetings

of the board of trustees of the NYRA.

"Answer: There is a committee that makes up the program.

"Question: Well, does the board of trustees discuss their program or make suggestions about it?

"Answer: Oh, maybe one or two.

"Question: For example, I saw a story in The New York Times the other day which said that there were some changes being made in connection with racing. They were going to have more grass racing and they were going to change some of the rules for stake races. Now, was that a typical discussion, would you say?

"Answer: Those are routine things. They are always changing. Nobody is ever satisfied. So if they say, 'Well, we are going to do this or that,' well, it doesn't make much difference, it goes around in circles. First they want long races, then they want short races, then they want longer races, then they want grass races, and if you have been around racing as long as I have, you will see them going around and around."

THE COURT: Who was this witness again?

MR. MOSS: John A. Morris, one of the trustees.

MR. HYDE: May we have the next question and answer where you are asking who "they" means.

2 MR. MOSS: "When you say they, do you mean the
3 trustees, the discussions at the meetings?

4 "Answer: The racing industry.

5 "Question: Now, specifically at the trustees'
6 meetings I would like to know specifically how these
7 discussions went.

8 "Answer: I will refer you to the minutes.

9 "Question: Does that still go around in circles
10 as you described it?

11 "Answer: From decade to decade, yes.

12 "Question: In other words, what occurs at these
13 trustees' meetings would you say is a reflection of what you
14 described as the attitude of the racing industry?

15 "Answer: Yes, very much."

16 Bottom of page 12:

17 "Question: And what is the difference between
18 grass racing and turf racing? Why should it make any
19 difference to anyone?"

20 THE COURT: Grass racing and what?

21 MR. MOSS: And dirt racing is what we mean.

22 THE COURT: I thought you said turf.

23 MR. MOSS: I know, it was written here, but it was a
24 misprint. I didn't mean to start there. There is just a lot
25 of discussion following that.

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MR. HYDE: Well, I --

MR. MOSS: You can read it all. I will put the whole thing in, as a matter of fact. I wanted to get to one particular bit that I missed so far, even in the first part I read.

MR. HYDE: There is going to be a gap here. Maybe we should have it all now.

MR. MOSS: "Answer: Well, grass racing is popular. The public likes it. The horses do not break down as readily on grass. Grass is the natural -- what do they call it? -- base that horses run on. They never ran on dirt until they got to racing" -- and I suppose he means get to racing. "In England, France, you have lots of rain and you have a good turf, deep soil. In this country you don't, and you have many races in a long time in the same place and grass racing will not take the races a day in the same spot for a long period.

"Question: Are overnights customarily raced on grass?

"Answer: No.

"Question: Are they customarily raced on dirt -- overnights?

"Answer: Yes.

"Question: Would you say that normally the request for more grass racing would come from people who own stake

1 wctb

2 horses?

3 "Answer: No.

4 "Question: Do you think" -- and here is the part
5 I was going to start reading:

6 "Question: Do you think it would be to the advantage
7 of people who own stake horses to have more grass races?

8 "Answer: Again, that depends on the horse. You have
9 horses for courses and courses for horses. If you have good
10 grass horses in your stable you want to race on grass. If you
11 have horses that don't run well on grass, then you want dirt
12 races. That's human nature."

13 THE COURT: A sound philosophy.

14 MR. MOSS: It is a sound philosophy, and I want to
15 give this man's opinion of the motivation of people at the
16 board of directors meetings.

17 MR. HYDE: I don't think we need depositions for such
18 obvious observations, your Honor.

19 THE COURT: Is that all?

20 MR. MOSS: I would like to repeat, "If you have a
21 good grass horse in your stable, you want to race on grass; if
22 you have horses that don't run well on grass, then you want
23 dirt races. That's human nature.

24 "Question: And would human nature also dictate that
25 if you had a lot of stake horses you would like to see stake

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payments eased?"

THE COURT: Eased.

MR. MOSS: Eased, e-a-s-e-d.

THE COURT: You mean the payment to get in?

MR. MOSS: Payments reduced to get in.

THE COURT: Yes.

MR. MOSS: "Answer: Well, you mean the nomination fees?"

"Question: Yes.

"Answer: Why, sure. And you would like to have the added money increased. What is it -- elementary, dear Watson? Was it Dr. Watson and Mr. Sherlock Holmes?"

You see, Mr. Morris agreed with you. That is the part which I wanted to read in at this time to give a philosophy and what the trustee thought of the philosophy of the board.

If your Honor please, we asked for three witnesses to be produced today, all of whom were, and I did think that they would fill the day. I was going to ask for a reasonably early adjournment today anyway, because there was a point when I did not know whether this trial was going to go on when I made an appointment for 5 o'clock or 5:30 out at Westbury, Long Island. I suggest that, and I realize that it is early, but --

THE COURT: You have nobody here?

1 wctb
2 MR. MOSS: No, your Honor. I would like to arrange
3 with the defendants now for the witnesses that we want
4 tomorrow. We have had this arrangement whereby we don't issue
5 subpoenas. We tell them who and when and they bring them in.

6 THE COURT: Are we going to be able to finish by
7 Thursday?

8 MR. MOSS: I have one witness who might go over
9 until Monday and the only one.

10 MR. HYDE: I might say, your Honor, as to Monday I
11 have a problem in that I have to argue a motion before Judge
12 Bonsal at 9:30 that involves different counsel and has been
13 adjourned many times. If we do go over until Monday, I would
14 appreciate it if we could start a little later.

15 MR. MOSS: I have just one witness of whom that is
16 true.

17 THE COURT: We can work something out, Monday or
18 Tuesday or whatever. I am starting a criminal case I believe
19 on Monday, so we will probably have it in the afternoon, as
20 the morning is more convenient for picking a jury.

21 MR. HYDE: All right.

22 THE COURT: Then there is no point in marking time
23 here. You have nothing further to do?

24 MR. MOSS: Right.

25 THE COURT: So tomorrow morning, as I said, 10:30.

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I may not be able to start at 10:30, but I am sure I will not be able to start any earlier than that.

MR. MOSS: We will be here by then. Thank you, sir.

(Adjourned to July 9, 1974, at 10:30 a.m.)

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2 -----X

3 Raymond E. Karlinsky, Howard Jacobson, :
 4 Harry M. Hatcher, and Horsemen's :
 Benevolent and Protective Association, :
 Inc., etc., :

5 :
 6 Plaintiffs, :

7 -against- :
 8

9 The New York Racing Association, Inc., :
 10 Jockey Club, James C. Brady, George D. :
 Widener, John C. Clark, etc., :

11 :
 12 Defendants. :

13 -----X

14 New York, N. Y.
 15 July 9, 1974 - 11 a.m.

16 MR. MOSS: Mr. Vanderbilt, please.

17 A L F R E D G. V A N D E R B I L T, called as a
 18 witness by the plaintiffs, being first duly sworn,
 19 testified as follows:

20 DIRECT EXAMINATION

21 BY MR. MOSS:

22 Q Mr. Vanderbilt, are you Chairman of the board of
 23 trustees of the New York Racing Association?

24 A I am.

25 Q Are you also a member of the Jockey Club?

A I am.

Q For how long have you been President of the board

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of trustees?

A This is my fourth year as Chairman of the Board.
I am not the President.

Q I mean Chairman, sorry.

THE COURT: There is a President also?

THE WITNESS: Yes, there is. Well, there has been
a President. At the moment there is not.

THE COURT: Who is the chief executive officer?
The Chairman?

THE WITNESS: The President.

Q Mr. Basil was President up to a few years ago, was
he not?

A He was. But at the time he was President he was
not the chief executive officer. The Chairman at that time
was the chief executive officer.

Q How long have you been a member of the Jockey Club?

A Since the middle thirties. About 40 years.

Q Were you a member of the Jockey Club at approximately
the time that the New York Racing Association was formed?

A I was.

Q Formerly known as the New York Association; we are
talking about the same thing.

A Yes.

Q Was the plan for a New York Racing Association

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2 developed under the auspices of the Jockey Club?

3 A Yes.

4 Q Was a Jockey Club committee appointed to do that?

5 A A committee of Jockey Club members was appointed.

6 Q By whom?

7 A I believe by the then Chairman of the Jockey Club.

8 Q It was appointed -- let me refresh your recollection --
9 by Mr. Phipps, who was then Vice-Chairman, the Chairman then
10 being absent or some such thing?

11 A That may be. I don't remember.

12 Q But, in any event, the committee was chosen by the
13 Chairman or President, as the case may be?

14 A Right.

15 Q And that committee consisted of three men?

16 A Yes, I think so.

17 Q Mr. Hanes, Mr. Chenery, and Captain Guggenheim?

18 A Yes.

19 Q Did they come up with a Jockey Club plan?

20 A They came up with a plan.

21 Q With a plan.

22 A Yes.

23 Q Would you tell us what happened and how the New York
24 Racing Association was formed, please.

25 THE COURT: Isn't this all what we have heard

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before?

MR. MOSS: Yes. There was some of this, but I would like to -- part of it is cumulative, I will concede, and part of it may give us some variations that the other witness was not familiar with.

THE COURT: All right.

A In a very broad way, a corporation, I guess it would be called, or an entity was formed which was empowered to buy the then existing New York tracks and merge them and operate them as a nonprofit or non-dividend-paying corporation.

Q Was the association formed? Is that correct?

A Yes.

Q Were there twenty trustees provided for?

A I believe so.

Q Were all those original trustees appointed from the ranks of the Jockey Club?

A Yes.

Q Up to the time of the appointment of Mr. Dreyfus in 1968 or 1969, whenever it might have been, is it true that there was never a trustee who was not appointed from the ranks of the Jockey Club?

MR. HYDE: Your Honor, this has been asked, put to three or four witnesses now, and it has been stipulated to.

THE COURT: He seems to think that I learn hard.

2 MR. MOSS: I am getting to something, if your Honor
3 please. This is preliminary to a question, and I am making a
4 record here, if your Honor please, which after yesterday's
5 conversation I deem to be extremely necessary.

6 THE COURT: But I don't see the Court of Appeals
7 needs to read it more than once either.

8 Q In any event, Mr. Vanderbilt, is that so?

9 A Yes.

10 Q Mr. Dreyfus was appointed to the board of trustees
11 and shortly thereafter became a member of the Jockey Club,
12 is that correct?

13 A He was later elected to membership of the Jockey
14 Club.

15 Q Yes.

16 A I am not sure whether it was shortly.

17 Q Within a year?

18 A I don't know.

19 THE COURT: What are the qualifications for
20 election to the Jockey Club?

21 THE WITNESS: I am not sure there are any
22 qualifications beyond just people think they would be a good
23 member.

24 THE COURT: What are you looking for? I take it
25 not musicians.

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THE WITNESS: No, no. People who are basically interested in racing and keeping up the best traditions of racing, carrying out the -- the Jockey Club's functions now are almost entirely concerned with registration of horses and keeping the thoroughbred records up to date.

THE COURT: What did it used to be?

THE WITNESS: It used to be, the Jockey Club used to be, the ruling body of horse racing in the country, back in, oh, I guess just after the turn of the century, where there were no racing commission, the state was not involved. A group of people who were interested in racing formed an association and more or less decreed themselves, I guess, to be the governing body. That condition maintained until, I would guess, the thirties, late twenties or the thirties, at which time the state racing commission got into it. And the Jockey Clubs -- all those powers at the Jockey Club, no longer exist.

THE COURT: I take it, by and large, the Jockey Club is made of people who own horses.

THE WITNESS: Mostly, yes. Horses of one sort or another. I don't know if there are any members of the Jockey Club that don't own horses, but that is a good rule of thumb.

THE COURT: By hypothesis not many people are in poverty that own racing horses?

1 wctb

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2 THE WITNESS: No. Although it has been described
3 sometimes as a step towards that.

4 BY MR. MOSS:

5 Q Mr. Vanderbilt, was it by coincidence or by design
6 that all members of the board of trustees were taken from the
7 members of the Jockey Club?

8 A I would say a little of both, probably. I think
9 that when -- originally it may have been by design, I don't
10 remember. It may very likely have been by design in the
11 beginning.

12 Q And thereafter?

13 A And thereafter, no, because the board of trustees
14 is no longer composed entirely of members --

15 Q Up to the time of 1969, say, was it not a fact
16 that there were no members of the board, with the exception of
17 Mr. Dreyfus, who were not members of the Jockey Club?

18 A That's correct.

19 Q Let us confine ourselves to that period of time.

20 A Before or after '69?

21 THE COURT: Before.

22 Q From the inception to the year 1969.

23 A Yes.

24 Q All of the members still were members of the Jockey
25 Club?

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A Yes.

THE COURT: Was that coincidence or design?

THE WITNESS: No, I think that was design. I think we were originally appointed from the members of the Jockey Club, and probably most of them were still members. If there were any new members taken in before that time, they were from members of the Jockey Club.

Q And the board of trustees is a self-perpetuating body, is it not?

A It is.

Q Each trustee owns \$50 worth of stock in the corporation, is that correct?

A I think that is correct. They own a share of stock.

Q I think it is ten shares actually, or five shares, something like that. But that is not important.

A Whatever it is, right.

Q When he resigns, what happens to his shares of stock?

A I am not sure.

Q Would it help you if I suggest to you that perhaps he has to turn them over to his successor as trustee for the same \$50?

A Yes.

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Q Is that true, do you think?

A I think that is true if there is an immediate successor.

Q Well, whenever a successor appears on the scene that is what happens, isn't that so?

A Yes.

THE COURT: These facts must be establishable by better than guessing of the witness.

MR. MOSS: I agree with you, but I did not know that the witness would feel that he had to guess at this. I thought he would know. That is why I asked.

THE COURT: Well, you have apparently been disillusioned.

What happens if a trustee dies, do you know?

THE WITNESS: Well, that I don't know. I can guess or assume that the corporation picks it up and has another trustee buy it back.

THE COURT: If it is relevant, you eminent lawyers must know what the facts are. Why don't you just stipulate?

MR. MOSS: Have I stated it correctly?

MR. HYDE: Your Honor, I don't know what the legal mechanics exactly are. They are all spelled out in the certificate of incorporation. In substance what happens is that when the trustee dies or resigns, his shares ultimately

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pass to his successor at the same \$50 cost.

THE COURT: He or his estate gets \$50 and his successor pays for it?

MR. HYDE: Yes. There can be no capital gain ever realized by any stockholder or trustee on the disposition of his stock, and his stock is ultimately acquired by a successor. I don't know the exact legal mechanics.

THE COURT: Is that accurate for your purpose?

MR. MOSS: Yes, if your Honor please.

MR. HYDE: My partner, Mr. McCandless, says we have the charter and bylaws available and introducible.

THE COURT: If that is adequate.

MR. MOSS: As a matter of fact, I will consent to their introduction, without objection. I will put them in, not in connection with this particular examination, but just to have them in.

THE COURT: All right, we will get to it. Don't wait now.

MR. HYDE: It will take us a few minutes.

Q Mr. Vanderbilt, you, meaning the trustees collectively, appoint the Racing Secretary, do you not?

A Yes.

Q What are the functions of the Racing Secretary, please?

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A The Racing Secretary is responsible for programing the races, providing the horses that run throughout the season, and for deciding and getting the horses on the grounds by distributing the stalls.

Q Does he normally also act as the handicapper?

A Yes.

Q In connection with the conditioning of races, the racing program, and in connection with handicapping, are those areas in which there are frequent differences of opinion?

A Well, yes.

Q Is it a common practice for trainers to come to the Racing Secretary and say, "You have conditioned this race wrong" or "You haven't conditioned the race properly for my horse" or "You handicapped my horse wrong," that kind of thing?

A Well, I am not sure that it would be quite like that. I think that the trainer would be more apt to come and say, "I would like to have a race -- there is no race in this condition book for such-and-such a horse to run in, will you write a race that he would be able to run in?" Certainly in handicaps, weights, there are complaints about weights by everyone that the winner after every handicap. So that is by definition.

Q And most trainers will do some complaining and ask for changes in the way he treats their horses, is that correct?

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A Well, I wouldn't say so. Handicap weights are never changed once they are issued.

Q But somebody thinks about next time, does he not?

A Well, by then you have run in that one, that one is over.

Q What I am trying to say is this: Do trainers customarily go, say, "You put too much weight on my horse and I don't think you were fair to him"?

A No, I don't think they primarily do. There is a certain amount of good-natured kidding. But basically if your handicapper is any good, there is a minimum of that. If a horse carries top weight in a handicap and he is beaten, the trainer will go to the handicapper and say, "See, you had too much weight on my horse," and it is obvious that he did, that is why he was beaten.

Q Do you recall testifying in an examination before trial in this case?

A Yes.

Q Do you recall these questions and these answers?

MR. HYDE: What page is that?

MR. MOSS: Page 21, starting at the last line of the page.

Q Do you remember these questions and these answers:

"Question: Do trainers customarily speak to the" --

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2 it says speaking -- "customarily speak to the Racing
3 Secretary with respect to their ideas or complaints as to
4 how he handicaps horses or the kinds of conditions he imposes
5 or the kind of racing he puts on, is that customarily so?

6 "Answer: Yes.

7 "Question: All trainers do that?

8 "Answer: Well, most trainers do it.

9 "Question: And would that include the trainers or
10 trustees and members of the Jockey Club as well as other
11 trainers for other people?

12 "Answer: In all probability."

13 Do you remember those questions and those answers?

14 A I recall them from rereading my testimony, yes.

15 THE COURT: Were they right when you gave them?

16 THE WITNESS: Yes. Oh, sure.

17 Q Are those answers substantially correct?

18 A Yes.

19 Q Did you ever have any differences with your Racing
20 Secretary, Mr. Trotter, about the kind of races put on?

21 A Yes.

22 Q Will you explain the nature of those differences,
23 please.

24 A I felt, as representative of the NYRA, that he was
25 not putting on enough distance races; I felt that there was a

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type of race that he wrote which seemed to me a basically unfair race, and that by and large we were not getting the most value out of the horses that we had on the grounds.

Q Do distance races make any difference to people who own horses, the distance of a race?

A Well, of course it does, because every horse has limitations as to how far he can or cannot run.

Q Some horses are better at distances than others?

A That is correct.

THE COURT: Every horse has a maximum, or has an optimum distance?

THE WITNESS: Most horses do. Some horses are versatile, but most of them are not.

Q Can you state what Mr. Trotter's objection to changing the distance or increasing the number of distances was?

A No, I can't. I think that basically he felt that -- and he was correct in feeling -- that it is easier to put on a program of short races than a program of long races, chiefly because it is easier to train a horse for short distances, and most trainers feel that it is easier on the horse and they tend to want to run in short races.

I felt as Chairman, and I still do, that the public would rather see long distances, especially when it can be

long enough that the start is in front of the stand. It is just a lot more excitement to see. And that is the conflict that you are in.

THE COURT: The finish has to be?

THE WITNESS: The finish is always there.

THE COURT: It is a question of where you start?

THE WITNESS: Yes. Aqueduct, for instance, is a mile and an eighth track. If the race is a mile, the horses start far away from the stand and run down the back side and around. If it is a mile and an eighth, they start right in front of the stand and this is exciting and interesting and the public likes it.

Q If the distance of races was increased, certain horse owners would benefit from that, would they not?

A Well, certain horses would have more chances.

Q Yes.

A The horses that ran, that are better at distances, would do better than horses who were sprinters.

Q Did you want distances increased at all of your tracks or only at one or two?

A No, all.

Q You wanted them increased at all?

A Yes.

Q So that when you want the distances increased at

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all tracks, you did not relate it directly to where the grandstand was on each track, did you?

A Yes.

Q But you wanted them increased at all tracks?

A Well, you have three tracks here.

Q That is right.

A Two of them are mile and an eighth tracks.

Q That is right.

A The other one is a mile and a half track.

Q That is right.

A It is much harder and you need more of an increase at your mile and a half tracks.

Q Right.

A And it is more important because there are very few starts in front of the stand at the mile and a half track.

Q That would be true. But you said that you did it without regard to which track it was at, that you wanted bigger distances at all tracks, didn't you?

A That's right. I wanted more distance races at all three tracks.

THE COURT: Because the shorter races in all three tracks were not starting in front of the stands.

THE WITNESS: That is correct.

THE COURT: But the mile and a half, which is which

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2 one?

3 THE WITNESS: Belmont.

4 THE COURT: Belmont. The mile and a half track you
5 would have to have greater increase?

6 THE WITNESS: Yes. And it is very few, it is very
7 hard to get mile and a half races.

8 THE COURT: So you did not achieve your results?

9 THE WITNESS: Not nearly as well there as at the
10 other two tracks.

11 Q But you wanted them at all of the tracks?

12 A Yes.

13 THE COURT: If you could have had all mile and a
14 half at Belmont you could have?

15 THE WITNESS: Yes. But that is an impossible
16 situation, but it would have been nice.

17 Q Is there a school of thought in racing which just
18 generally prefers distance races to shorter races?

19 A I am sorry, I didn't hear the question.

20 Q Is there a school of thought in racing which just
21 thinks that distance racing is better than shorter racing?

22 A I don't know what you mean by a school of thought.

23 Q Is there a group of horsemen who have the belief
24 that distance racing is preferable to short distances, long
25 distances are preferable to short distances?